Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
Expedited Consideration for Declaratory Rulings	)	
On the transfer of traffic only under AT&T	)	
Tariff Section 2.1.8., and Related Issues	)	
	)	
Primary Jurisdiction Referral	)	
From the NJ District Court	)	
	)	WC Docket No. 06-210
One Stop Financial, Inc.	)	
Group Discounts, Inc.	)	
Winback & Conserve Program, Inc.	)	
800 Discounts, Inc.	)	
	)	
Petitioners	)	
and	)	
	)	
AT&T Corp.	)	
Respondent	)	

COMMENTS OF AT&T

James F. Bendernagel, Jr.
Joseph R. Guerra
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Christi Shewman
Gary L. Phillips
David L. Lawson
AT&T Services, Inc.
1120 20th Street, NW
Suite 1000
Washington, DC 20036
(202) 457-3090

Richard H. Brown
DAY PITNEY LLP
1 Jefferson Road
Parsippany, NJ 07054
(973) 966-6300

Attorneys for AT&T Corp.

September 1, 2016

TABLE OF CONTENTS

AT&T Corp. ("AT&T") submits this response to the Commission's *Public Notice*[1] calling for comment on a series of issues set forth in the two "petitions" for declaratory rulings identified in the notice. In light of the procedural history of this matter as well as the nature of the underlying requests themselves, AT&T submits that it would be arbitrary, capricious and an abuse of discretion for the Commission to address the new questions posed, much less to resolve any of those issues in favor of Petitioners or 800 Services, Inc. ("800 Services").[2]

As the Commission is aware, this proceeding grows out of Petitioners' efforts over 21 years ago to effectuate a two-step transfer of their WATS services. Specifically, Petitioners proposed that (1) they would transfer their Customer Specific Term Plans II ("CSTP II") (the "plans") along with the associated traffic to Combined Companies Inc. ("CCI"), and (2) CCI would transfer all of the revenue producing phone numbers and virtually all of the traffic associated with those plans, but not the plans themselves or associated obligations, to Public Service Enterprises of Pennsylvania ("PSE"). When AT&T refused to process these transfers, Petitioners sued in federal district court in New Jersey. That litigation led to an order requiring AT&T to allow the transfer of Petitioners' plans to CCI, and to a primary jurisdiction referral on the propriety of AT&T's refusal to process the proposed CCI-to-PSE transfer under AT&T's Tariff No. 2.

Two of the requests for declaratory rulings on which the Commission now seeks comment improperly raise questions about hypothetical *alternative* transfers that Petitioners

[1] Public Notice: Wireline Competition Bureau Seeks Comment on Group Discounts' Petitions for Declaratory Rulings, WC Docket No. 06-210 DA 26-912 (rel. Aug. 11, 2016) (the "*Public Notice*").

[2] In its *Public Notice*, the Commission makes no reference to 800 Services, Inc. ("800 Services"), which has joined in certain of the noticed declaratory ruling requests. Consequently, the term "Petitioners," as used herein, refers to One Stop Financial, Inc., Winback & Conserve Program, Inc., 800 Discounts, Inc., and Group Discounts, Inc. (*i.e.*, the Inga companies) but not 800 Services. Nevertheless, this filing is intended to respond to the arguments made by both Petitioners and 800 Services in support of the noticed requests.

either abandoned decades ago or never requested. By obtaining a judicial order that compelled the transfer of their plans to CCI, Petitioners abandoned any request to transfer the traffic on their plans *directly* to PSE. Because any such "direct transfer" claim is now barred by principles of waiver and estoppel, a Commission ruling on such a theoretical transfer would be moot. And any ruling on an alternative "add and delete" transfer theory suffers from the same defect and is in all events barred by the D.C. Circuit's prior decision in the case. Both issues, moreover, fall outside the scope of the district court's primary jurisdiction referral.

The Commission also seeks comment on the nonsensical claim that AT&T's refusal to process the proposed CCI-to-PSE transfer *in January of 1995* violated a Commission order that (1) was issued *in October 1995*, and (2) governed the process of *revising* tariffs, not the application of existing tariffs. Another request asserts that AT&T "shut down" "traffic-only" transfers *after* AT&T refused to process the proposed CCI-to-PSE transfer and asks whether this constituted an "illegal remedy." This request thus poses another academic question that has no bearing on Petitioners' claims and falls outside the scope of the district court's referral.

Finally, the Commission requests comments on questions about the alleged "immunity" of certain plans from shortfall charges and the propriety of AT&T's imposition of such charges on end-users in June 1996 (the "shortfall imposition" claim). The Commission has previously recognized, however, that the "shortfall imposition" issue is outside the scope of the district court's referral and not properly raised here. The issue of "shortfall immunity," moreover, has been fully briefed,[3] and the Commission's October 1995 order has no bearing on the proper resolution of that issue.

[3] *See e.g.*, Comments of AT&T in Opposition to Requests for Declaratory Ruling, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210, at 31-34 (Dec. 20, 2006) ("AT&T 12/20/06 Comments").

I. BACKGROUND

Given the extraordinary length of the agency proceedings relating to the district court's referral, combined with the Commission's prior actions and statements concerning issues that fall outside the scope of that referral, it would be arbitrary, capricious and an abuse of discretion for the Commission to entertain new issues concerning long ago events. Accordingly, AT&T provides the following background information and facts to place the Commission's *Public Notice* in its proper context.

A. The Initial Referral And Initial Commission Decision

After Petitioners sued AT&T in the district court in 1995, they were eventually required to file a petition for declaratory ruling with the Commission concerning the propriety of AT&T's refusal to process the proposed CCI-to-PSE transfer. Petitioners did so in July 1996, posing four issues.[4] AT&T explained in response that it objected to the CCI-to-PSE transfer "[p]recisely because the proposed CCI-to-PSE transaction was artificially structured to enable Petitioners to evade shortfall or termination liabilities," and that, as a result, the "proposed transfer was (i) not authorized under the transfer provisions of AT&T's tariff (Section 2.1.8); and (ii) a violation of the antifraud provisions of the tariff (Section 2.2.4)."[5] AT&T also asked the Commission to

[4] Specifically, Petitioners sought rulings that (1) "neither Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, nor any other provision of AT&T's Tariff F.C.C. No. 2, prohibited" the proposed CCI-to-PSE transfer; (2) AT&T had no legal basis and could not have effectively tariffed any "changes or additions to Section 2.1.8 or any other published provision of its Tariff F.C.C. No 2, subsequent to January 1995, which could have substantively affected CCI's right to assign the traffic under its CSTP II plans to PSE in January, 1995"; (3) as a result, AT&T "had no legal basis to refuse to accept the transfer (assignment) of that traffic from CCI to PSE"; and (4) AT&T's refusal "was, therefore, in violation of AT&T's tariff" and its obligations under provisions of the Federal Communications Act and Commission rules. Joint Petition for Declaratory Ruling, *Joint Petition for Declaratory Ruling on The Assignment of Accounts (Traffic) Without The Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, Internal File No. CCB/CPD 96-20, at 7-8 (Jul. 15, 1996) ("1996 Petition for Declaratory Ruling").

[5] Comments of AT&T Corp. in Opposition to Joint Petition for Declaratory Ruling and Joint Motion for Expedited Consideration, Internal File No. CCB/CPD 96-20, at 13-14 (Aug. 26, 1996) ("AT&T Opp. to 1996 Petition").

resolve the question whether pre-June 17, 1994 CSTP II plans could have shortfall charges imposed.[6]

The referring court subsequently entered a stay pending a ruling by the Commission.[7] In 1997, Petitioners filed a Supplemental Complaint with the New Jersey district court, asserting that AT&T had discriminated against them by not giving them a more favorable contract tariff and by refusing to permit the traffic transfer to PSE (the "discrimination" claim).[8] They also alleged that AT&T had improperly imposed shortfall charges on CCI's end-users in 1996.[9]

In January 2003, the Commission issued its initial decision regarding the 1996 Petition for Declaratory Ruling.[10] The Commission concluded that section 2.1.8 did not apply to the "traffic-only" transfer from CCI to PSE and thus did not prohibit that transfer.[11] The Commission reasoned that AT&T had conceded that the term "WATS" meant only the underlying CSTP-II plans themselves, not the traffic associated with those plans, and that

---

[6] *Id.* at 3, 14-19.

[7] Order, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. Aug. 12, 1996) (Dkt. No. 69).

[8] Supplemental Complaint, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. Mar. 4, 1997) (Dkt. No. 75) ("3/4/97 Supp. Compl.") (AT&T 12/20/06 Comments, Ex. 15) Shortly after the filing of the supplemental complaint, proceedings in the district court regarding those allegations were stayed. Order, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. Mar. 13, 1997) (Dkt. No. 76).

[9] *Id.* Petitioners initially sought to pursue this claim before the Commission and to that end, on December 18, 1996, Petitioner Winback & Conserve, Inc. ("Winback") filed a Counter Complaint against AT&T alleging, among other things, that AT&T's imposition of shortfall charges on CCI's end-users violated 47 U.S.C. § 201(b). *See* Counter Complaint of Winback & Conserve Program, Inc., *AT&T Corp. v. Winback & Conserve Program, Inc.*, File No. 97-02 (Dec. 18, 1996). However, Winback subsequently withdrew that Counter Complaint and filed the 3/4/97 Supplemental Complaint with the district court, thereby electing to pursue those claims before the district court. *See* Notice of Withdrawal, *AT&T Corp. v. Combined Companies, Inc.*, File No. 97-02, at 1-2 (Feb. 3, 1997). By order dated July 15, 1997, the Commission dismissed Winback's Counter Complaint without prejudice. Letter Ruling, *AT&T Corp. v. Winback & Conserve Program, Inc.*, File No. 97-02 (Jul. 15, 1997); *see also* Mem. Op. & Order, *AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd. 16074, 16077, at ¶ 11 n.28 (2001) (discussing Winback's voluntary withdrawal of the Counter Complaint against AT&T).

[10] Mem. Op. & Order, *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, 18 FCC Rcd. 21813 (2003) (the *"2003 Order"*).

[11] *Id.* ¶ 9.

section 2.1.8 therefore governed only the transfer of plans, not the transfer of traffic.[12] The Commission also ruled that AT&T could not prohibit the transaction under the tariff's "fraudulent use" provision.[13]

Of equal significance, for present purposes, is what the Commission declined to address. First, it did not address Petitioners' request for a determination whether AT&T could have effectively tariffed any changes to section 2.1.8 or any other provision of its tariff after January 1995 that could have affected CCI's right to assign the traffic to PSE in January 1995. Noting that AT&T had not argued that any revisions to its tariff that became effective after January 1995 governed the resolution of this matter, the Commission declined to rule on this request "because the issue is moot."[14] Specifically, the Commission noted that, despite its "broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to 'terminate a controversy or remove uncertainty,'" when a petition for declaratory ruling "derives from a primary jurisdiction referral, the Commission will seek, in exercising its discretion, to resolve issues arising under the Act that are necessary to assist the referring court. Resolution of this issue is not necessary to assist the district court."[15]

Second, the Commission declined to rule on any claim that AT&T had previously permitted traffic-only transfers and thus had engaged in unlawful discrimination by refusing to process the CCI-to-PSE transfer. The Commission noted that declaratory relief is inappropriate where factual issues are undeveloped or disputed, and concluded that further factual

[12] *Id*.

[13] *Id.* ¶¶ 10-13.

[14] *Id.* ¶ 14.

[15] *Id.* ¶ 15.

development should occur in the district court, in accordance "with petitioners' original choice of forum for this dispute" and "the court's primary jurisdiction referral."[16]

Finally, the Commission "decline[d] to address issues concerning AT&T's shortfall charges."[17] It noted that Petitioners had raised arguments about the legality of AT&T's imposition of shortfall charges on CCI's end-users in a joint motion for an expedited ruling, and that a number of end-users had written to the Commission about the charges.[18] But, the Commission further noted that, in light of AT&T's statement that it would transfer the charges to CCI, the issue was "moot," and it therefore concluded that any claim that the shortfall charges authorized by AT&T's tariff were unreasonable was "irrelevant" and "not referred to us by the district court."[19]

B. The D.C. Circuit Decision And Judicial Proceedings Leading To The Renewed Referral

AT&T appealed the Commission's initial decision to the D.C. Circuit, which held that section 2.1.8 did apply to traffic transfers, and that AT&T had not conceded otherwise.[20] The court explained that it would "eviscerate[]" the acknowledged purpose of section 2.1.8 to allow PSE to acquire "nearly all the services—all the benefits—associated with [the] CSTP II plans" and to leave behind "CCI's obligations—the burdens under the plans."[21] Noting Petitioners' assertion that the only obligations that have to be assumed are the outstanding indebtedness and the unexpired portions of any applicable minimum service period, the D.C. Circuit stated that:

---

[16] *Id.* ¶ 18 n.87.

[17] *Id.* ¶ 20 n.94.

[18] *Id.*

[19] *Id.*

[20] *AT&T Corp. v. FCC*, 394 F.3d 933, 937, 939 (D.C. Cir. 2005).

[21] *Id.* at 938.

whether the enumeration of two obligations in section 2.1.8 affected the "requirement that new customers assume '*all* obligations of the former Customer' is beyond the scope of our opinion."[22]

After the D.C. Circuit's decision, Petitioners filed a motion to lift the stay, arguing, among other things, that the Commission had resolved the "all obligations" issue in their favor and that the issue was in all events a "red herring" and "bogus."[23] The district court denied the motion, finding that the Commission had not determined whether PSE had to assume shortfall and termination commitments under section 2.1.8 because "it had already determined that § 2.1.8 did not apply" to the proposed transfer.[24] Accordingly, the court directed Petitioners to file a petition for declaratory ruling to obtain a determination on the "all obligations" issue.

C. The Renewed Referral And The Commission's Refusal To Expand Its Scope.

In September 2006, Petitioners filed a petition with the Commission that raised not only the "all obligations" issue under section 2.1.8, but also the discrimination and "shortfall imposition" claims asserted in their Supplemental Complaint. After AT&T objected that the latter two issues had not been referred, Petitioners sought an extension of time so they could determine "whether the District Court wants just the traffic only transfer issue resolved or all

---

[22] *Id.* at 939 n.2.

[23] *See* Brief in Support of Motion to Lift Stay, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908, at 10, 11-12, 14 (D.N.J. May 31, 2005) (Dkt No. 125-6); Letter of Frank P. Arleo to Hon. William G. Bassler, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908, at 2 (D.N.J. May 11, 2006) (Dkt. No. 141) (AT&T 12/20/06 Comments, Ex. 8).

[24] *See* Opinion, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908, at 14 n.5 (D.N.J. June 1, 2006) (Dkt No. 146) (AT&T 12/20/06 Comments, Ex. 11). The court also denied Petitioners' request for re-argument, explaining again "that the FCC did not determine what obligations should transfer under § 2.1.8 in its October 2003 Opinion, because the FCC found that § 2.1.8 did not even apply to the [CCI/PSE] transaction." *See* Letter Order, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908, at 3 (D.N.J. Aug. 7, 2006) (Dkt No. 161).

other issues."[25] In addition, Tips Marketing Services, Corp. ("Tips"), another entity owned by Petitioners' principal, Mr. Alfonse Inga, filed a request for a declaratory ruling that, among other things, AT&T "us[ed] an illegal remedy in inflicting shortfall and termination charges to non Florida based CCI's end-users, well in excess of the aggregator afforded CSTPII/RVPP discounts."[26] At the same time, Petitioners requested that the Tips' request for declaratory rulings be combined with their pending petition.[27]

The Commission promptly rebuffed this effort to expand the proceedings beyond the scope of section 2.1.8. On January 12, 2007, it issued an order noting that the district court's June 2006 order "asks us to revisit the issue previously presented" and:

> does not expand the scope of the issue previously presented. Rather, *we have been asked to interpret the scope of section 2.1.8 of AT&T's Tariff No. 2*, a matter already extensively briefed by the parties. Accordingly, we will not extend the reply comment period in this proceeding to await further direction from the district court. We grant a brief extension to the parties to file reply comments, which should be informed by this reminder as to the scope of the matter presented here.[28]

At the time the *January 2007 Order* was issued, Petitioners plainly understood this order to mean that the Commission would *not* consider any issues *other than* the scope of section 2.1.8. Petitioners therefore filed a motion entitled "Request for Reconsideration or FCC Guidance for District Court Re: Issues Already Commented On, *But Not Before FCC*" (Feb. 8,

---

[25] *See* Request for Extension of Time to File Reply Comments, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; DA-06-2360; WC Docket No. 06-210, at ¶ 11 (Dec. 29, 2006).

[26] *See* Request for Declaratory Rulings, *Expedited Consideration for a Declaratory Ruling to Determine The Jurisdictional & Revenue Scope for Florida Department of Revenues and The IRS Tax Base Under AT&T's CSTPII/RVPP Offering to Then Further Calculate The Florida & IRS Tax Rewards For Tips Marketing Services, Corp.*, WC Docket No. 07-278, at 6 ¶ 18 (Jan. 3, 2007) ("Tips 1/3/07 Dec. Ruling Req.").

[27] Request for Combining Declaratory Rulings and Extension of Time to File Reply Comments, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; DA-06-2360; WC Docket No. 06-210 (filed Jan. 5, 2007).

[28] *See* Order Extending Pleading Cycle, *Joint Petition for Declaratory Ruling on The Assignment of Accounts (Traffic) Without The Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, 22 FCC Rcd. 300, at ¶¶ 2-3 (2007) ("*January 2007 Order*") (emphasis added).

2007) (emphasis added).[29] In that motion, they asked whether they should seek a Court order to expand the referral, or to issue a new referral that would "receive its own FCC case ID and additional public comments."[30] Petitioners also wrote to the district court noting that, "[o]n January 12, 2007, the FCC entered an Order stating that the shortfall and discrimination issues were not specifically referred to the FCC," and asking the court to issue an order clarifying that the court's primary jurisdiction referral included the discrimination and shortfall issues.[31] The court ultimately denied Petitioner's request for a "modified referral to the FCC."[32]

D. Petitioners' Refusal To Abide By The *January 2007 Order* And Their Unceasing Efforts To Expand And Manipulate The Proceedings.

After demonstrating their clear understanding that the referral was limited to the scope of section 2.1.8, Petitioners began a relentless, improper and vexatious campaign to expand and manipulate the scope of the proceedings. Less than a month after seeking reconsideration of the *January 2007 Order*, Tips submitted a fabricated "referral," purportedly from the Internal Revenue Service ("IRS"), to try to force the Commission to address the shortfall imposition

[29] Request for Reconsideration or FCC Guidance for District Court Re: Issues Already Commented On, But Not Before FCC, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; DA-06-2360; WC Docket No. 06-210 (Feb. 8, 2007); *see also id.* at 2 (referring to shortfall imposition claims).

[30] *Id*. at ¶ 6; *see also* Additional Comments in Further Support of Reconsideration or Clarification of The FCC's Jan. 12, 2007 Order, *Expedited Consideration for Declaratory Rulings On The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8. and Related Issues*, CCB/CPD 96-20; DA-06-2360; WC Docket No. 06-210 (Feb. 15, 2007); Further Comments of Petitioners Regarding Reconsideration and Clarification of FCC Oct 12th 2007 Order, *Expedited Consideration for Declaratory Rulings On The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8. and Related Issues*, CCB/CPD 96-20; DA-06-2360; WC Docket No. 06-210 (Feb. 26, 2007).

[31] *See* Letter from Frank P. Arleo to Hon. Susan D. Wigenton, misfiled in *AT&T v. Winback & Conserve, Inc.*, Civ. No. 93-5456, at 7 (D.N.J. Mar. 29, 2007) (Dkt No. 101) (Attached hereto as Ex. 1); *see also* Letter from Frank P. Arleo to Hon. Susan D. Wigenton, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. May 31, 2007) (Dkt. No. 163) (AT&T 7/18/07 Reply in Support of Sanctions, Ex. 32).

[32] Order, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. June 20, 2007) (Dkt No. 165). (Attached hereto as Ex. 2).

claim.[33] Citing the "IRS" letter, which Mr. Inga would later admit he himself had written,[34] Tips argued that the Commission "**Must Now Consider All 'Open Issues**.'"[35]

The next month, Petitioners asked the Commission to "drop the reconsideration" of their discrimination claims, and to resolve the traffic transfer and shortfall imposition issues.[36] They then unilaterally declared victory on the traffic transfer issue, based on an alleged AT&T "concession," and filed a "notice that comments are closed on this issue and for the FCC to issue 203(c) violation on the traffic only transfer issue."[37] Petitioners then changed course again and asked the Commission if it would suspend the matter so they could seek summary judgment on various issues in the district court.[38]

In September 2007, Petitioners again asked the Commission whether it would address the shortfall imposition claim, noting that "there has been no Public Notice issued" in the Tips proceeding, and they threatened to file a "writ of mandamus to the DC Circuit to obtain the

---

[33] *See* Ex-Parte Comments of Tips Marketing Services, Corp. Regarding Internal Revenue Service Primary Jurisdiction Referral to FCC In Support of Petitioner's Declaratory Ruling Request, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Mar. 16, 2007) ("Tips 3/16/07 Ex Parte").

[34] Opposition to AT&T Motion for Sanctions Against Alfonse Inga and Petitioners & Motion for Sanctions Against AT&T for Frivolous Request for Sanctions, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210, at 12 (Aug. 17, 2007); *see also* Reply in Support of AT&T's Motion for Sanctions And Opposition to Motion for Sanctions Against AT&T, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210, at 2, 5-6 (July 18, 2007) ("AT&T 7/18/07 Reply in Support of Sanctions").

[35] *See* Tips 3/16/07 Ex Parte at 3 (emphasis in original).

[36] Letter from Al Inga (One Stop Financial *et al*.) to Marlene H. Dortch, Secretary, FCC, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210, at 1 (Apr. 3, 2007).

[37] Letter from Al Inga (800 Discounts *et al.*) to Marlene H. Dortch, Secretary, FCC, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210, at 2 (Apr. 9, 2007).

[38] Email from Al Inga (Petitioners) to FCC Staff (Apr. 26, 2007).

referral order that the FCC seems to require."[39] Later that month, Petitioners filed yet another motion to expand the FCC proceedings to include the shortfall imposition claim.[40] In January 2008, they submitted additional comments concerning the scope of the proceeding and, four months later, submitted a motion to expedite that sought, among other things, a ruling on the shortfall imposition claim.[41]

After a several-year hiatus, Petitioners renewed their campaign. In May, 2014, they temporarily withdrew their declaratory ruling request with respect to "the June 17th 1994 provision."[42] The next month, they filed a motion asking the Commission to advise the parties "what issues are pending based upon NJ District Court referral & declaratory rulings requested by petitioners."[43] In September 2014, the Commission terminated the Tips proceeding.[44]

---

[39] Motion for FCC to Announce Whether or Not it Will Address Shortfall/and or Discrimination Claims, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210, at 2 (Sept. 12, 2007).

[40] Motion to Expand the Proceedings to include the Adjudication of June 17th 1994 Grandfather Provision and the June 1996 Shortfall Application Illegal Remedy, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Sept. 27, 2007).

[41] Petitioners [sic] Supplemental Submission in Further Support of Its Motion for Sanctions: Comments in Response to AT&T's Dec 13th 2007 FCC Comments, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Jan. 9, 2008); Petition to Expedite FCC Decisions, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues; Expedited Consideration for a Declaratory Ruling to Determine The Jurisdictional & Revenue Scope for Florida Department of Revenues and The IRS Tax Base Under AT&T's CSTPII/RVPP Offering to Then Further Calculate The Florida & IRS Tax Rewards For Tips Marketing Services, Corp.*, WC Docket Nos. 06-210, 07-278 (Apr. 28, 2008).

[42] Letter from Al Inga (One Stop Financial *et al*.) to FCC Staff, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210, at 1 (May 6, 2014).

[43] Motion to Advise Parties What Issues Are Pending Based Upon NJ District Court Referral & Declaratory Rulings Requested by Petitioners, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210, at 1 (June 2, 2014). (capitalization altered).

[44] *See* Order, *Termination of Certain Proceedings as Dormant*, CG Docket No. 14-97, Attachment, 29 FCC Rcd. 11, at 47 (Sept 15, 2014).

Three months later, Petitioners asked the Commission to temporarily suspend the referral proceeding based on the demonstrably incorrect claim that any ruling concerning the meaning of section 2.1.8 would have prospective effect only.[45] Once again, moreover, they incorrectly asserted that Judge Bassler had "requested the FCC to interpret the infliction of shortfall and termination charges inflicted against the plans in July 1996."[46] In conjunction with this request, Petitioners asked the district court to lift the stay based, in part, on their new mootness claim.[47]

Shortly after the district court denied their motion to lift the stay,[48] Petitioners filed a motion with the Commission asserting yet another "mootness" theory. Although the *January 2007 Order* had expressly stated that the Commission had "*been asked to interpret the scope of section 2.1.8 of AT&T's Tariff No. 2*" and that the Commission's "goal" was "to assist the referring court,"[49] Petitioners claimed that the order actually held that the section 2.1.8 issue—and indeed, that the entire proceeding—was moot.[50] Despite this claim of mootness, however, they also raised arguments that shortfall charges should have been waived under section 2.5.7 of

[45] Petitioners Wish to Temporarily Suspend FCC Proceedings on The Traffic Only Transfer Issue as It Has Confirmed FCC Prospective Notice Procedures Make This Is [sic] A Moot Issue – Petitioners Will Notify FCC [sic] The Feedback From The NJFDC RE: The FCC Decision is Moot, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210, at 1-2 & n.1 (Dec. 10, 2014).

[46] *Id*.

[47] Brief In Support, Per 2007 FCC Order Judge Bassler's 2006 Referral Is Moot As It Did Not Expand The Scope of The Third Circuit Referral, Misrepresentations on NJFDC Judges Bassler and Wigenton, Plaintiffs' Motion to Lift Stay And Schedule Damages, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. Feb. 26, 2016) (Dkt. No. 188).

[48] Order (Amended), *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. May 19, 2015) (Dkt. No. 179) (Attached hereto as Ex. 3).

[49] *January 2007 Order* ¶ 3 (emphasis added).

[50] Motion to Clarify Jan 12th 2007 FCC Order, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Apr. 10, 2015); *see also* Judge Bassler's Referral is Moot Per FCC's Jan 12th 2007 Order Plaintiff's [sic] Will Advise Judge Wigenton, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Apr. 11, 2015).

AT&T's Tariff No. 2.[51] A month later, Petitioners moved (again) to temporarily suspend the proceeding based on the Commission's supposed determination, in the *January 2007 Order*, that the meaning of section 2.1.8 is a moot issue.[52]

In December 2015 and January 2016, Petitioners renewed their motion to temporarily suspend the proceedings,[53] *after* the agency announced that a draft decision was "on circulation" to the full Commission.[54] In February 2016, they moved to end the case based on an argument concerning AT&T's supposed failure to satisfy the tariff's "15 days statute of limitations"[55]—a claim they had raised at the very outset of renewed proceeding. That same month, they again argued the case was moot as a matter of law.[56] Several days later, however, they filed arguments concerning the meaning of section 2.1.8.[57]

---

[51] *See* COMMENTS: Waiver of Shortfall Charges Due to Circumstances Beyond the Customer's Control, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Apr. 22, 2015).

[52] Temporarily Suspend FCC Proceedings Due to The Judge Bassler Referral Having Been Determined as Moot & AT&T's Shutting Down 2.1.8 also Makes AT&T's 2.2.4 Fraudulent Use Defense Moot, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (May 22, 2015).

[53] *See* PETITIONERS COMMENTS: FCC Jan 12th 2007 Order Confirms What is before the FCC is MOOT!!!!!!!! It Also Confirms the FCC Acknowledges a Fraud on Judge Bassler was used to Create the new Defense, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (posted Dec. 18, 2016); Motion to Temporarily Suspend FCC Declaratory Ruling Proceedings Due to FCC Orders That Resolve Liability Against AT&T and Have Not Been Seen by NJFDC, The FCC Proceedings Should Remain Open Only to Consider Plaintiffs [sic] Sanctions Request That Will Be Filed This Week, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Jan. 20, 2016).

[54] *See* FCC, Items on Circulation, *available at* https://transition.fcc.gov/fcc-bin/circ_items.cgi (last visited Aug. 20, 2016) (showing circulation date of Nov. 2, 2015).

[55] Motion to End Case Due to 15 Days Statute of Limitations – Tariff Mandate to Deny CCI-PSE Transfer Within 15 Days Not Met – Merits of Fraudulent Use Was Decided By March 1996 Decision, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Feb. 8, 2016).

[56] Letter of Raymond A. Grimes (Petitioners) to Richard Brown (AT&T), *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Feb. 28, 2016) (posted Feb. 29, 2016).

[57] Further Comments on Section 2.1.8, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Mar. 1, 2016).

On February 26, 2016, Petitioners filed another motion with the district court seeking to lift the stay of judicial proceedings. Despite the pendency of this motion, they began filing new requests for declaratory rulings with the Commission, including some of the same requests that are the subject of the *Public Notice*.[58] After the court denied Petitioners' most recent motion to lift the stay,[59] 800 Services, Inc., a company that is not owned by Mr. Inga but is now represented by Petitioners' current counsel, began filing requests for declaratory rulings concerning many of the same issues that Petitioners had earlier sought to raise.[60] As AT&T has previously explained, 800 Services sued AT&T in 1998 for various claims related to its post-June 1994 CSTP plans, and the district court (Judge Politan) dismissed all of 800 Services' claims in 2000 and awarded AT&T a judgment of $1.7 million, of which approximately $1.4 million was for unpaid shortfall charges.[61] That decision was affirmed by the Third Circuit,[62] but

[58] *See* Additional Declaratory Ruling Requests Based Upon the Evidence Submitted within FCC Case ID 06-210, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Mar. 2, 2016); Motion to Include Petitioners Supplemental Declaratory Rulings Requests that were Initially Filed in 1996 that Cover the FCC's Delete and Add Permissibility of Moving Accounts from CCI to PSE Under 3.3.1Q Bullet 4, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Mar. 9, 2016); Letter from Raymond A. Grimes (Petitioners) to Richard Brown (AT&T), *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (Mar. 15, 2016).

[59] Letter Order, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. May 18, 2016) (Dkt. No. 210) (AT&T Ex Parte Letter attachment (posted May 27, 2016)).

[60] *See* 800 Services, Inc. Request for Declaratory Rulings & Reliance Upon Comments in Case 06-210, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (dated June 2, 2016) (filed June 7, 2016) (*"800 Services June 2 Petition"*); Further Support of 800 Services, Inc. Request for Declaratory Rulings & Reliance Upon Comments in Case 06-210, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (June 20, 2016) (*"800 Services June 20 Req. for Decl. Rulings"*).

[61] *See* Letter Op. & Order, *800 Services, Inc. v. AT&T Corp.*, Civ. No. 98-1539 (D.N.J. Aug. 28, 2000) (*"2000 Politan Decision"*), attached as Exhibit B to *Ex Parte* Letter from James F. Bendernagel (AT&T) to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-210 (July 1, 2016) (*"AT&T July 1 Ex Parte"*).

[62] *800 Services, Inc. v. AT&T Corp.*, 30 Fed. App'x 21 (3rd Cir. 2002), also attached as Exhibit B to the *AT&T July 1 Ex Parte*).

AT&T has not collected anything on the judgment because 800 Services had nothing more than *de minimis* assets.

On July 1, 2016, counsel for Petitioners and 800 Services filed a document entitled "Petition for Declaratory Rulings, Declaratory Ruling Requests Which Will Rely Upon The Comments Within Case 06-210."[63] And, on July 11, 2016, he filed a petition for additional declaratory rulings on behalf of 800 Services and Petitioners.[64] Ostensibly a joint petition, the *July 11 Petition* re-argues at length the facts of the case that 800 Services lost against AT&T some 15 years ago.[65] The Commission has identified these two petitions (along with the corrected version of the July 11, 2016 filing) in its *Public Notice* and, without further elaboration or specification, has sought comments on the various requests set forth in both.[66]

---

[63] Petition for Declaratory Rulings, Declaratory Ruling Requests Which Will Rely Upon The Comments Within Case 06-210, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (dated June 30, 2016) (filed July 1, 2016) ("*June 30 Petition*").

[64] Additional Declaratory Ruling and Further Support of 800 Services, Inc. and Winback & Conserve Program, Inc., One Stop Financial, Inc. and Group Discounts, Inc. Previous Requests for Declaratory Rulings & Reliance Upon Comments in Case 06-210, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (dated July 10, 2016) (filed July 11, 2016) (*"July 11 Petition"*). A corrected version of this petition was filed on July 12, 2016. *See* ADDITIONAL DECLARATORY RULING – Corrections to Yesterday's Filing, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (July 12, 2016) (*"Corrected July 11 Petition"*).

[65] *See July 11 Petition* at 3-12.

[66] The *Public Notice* describes the two petitions for declaratory rulings as concerning, among other things, "whether AT&T is precluded from raising any defenses." In the *Corrected July 11 Petition*, Petitioners ask whether "AT&T's failure to comply with the FCC 1995 Order to timely file and meet the substantive [sic] cause test preclude it from raising any defenses under these tariff sections." *Corrected July 11 Petition* at 2. AT&T assumes that the *Public Notice's* statement about whether AT&T is "precluded from raising any defenses" refers to this query in the *Corrected July 11 Petition*. AT&T addresses those arguments below. *See infra* at 35-36. To the extent that this statement in the *Public Notice* refers to arguments made by Petitioners concerning the time in which to respond to a declaratory ruling (*see 800 Services June 20 Req. for Decl. Rulings*), AT&T responded to those arguments in its letter filed on July 1, 2016. *See AT&T July 1 Ex Parte*. Moreover, because the Commission has now requested comment on these untimely and improper requests for declaratory ruling, it would be arbitrary, capricious and a clear abuse of discretion to rule that AT&T is somehow barred from commenting on them.

II. ARGUMENT

A. Resolution Of The Issues Raised In The Requests For Declaratory Rulings Would Be Arbitrary, Capricious And An Abuse Of Discretion.

In light of the procedural history set forth above, it would clearly be arbitrary, capricious and an abuse of discretion for the Commission to entertain any new issues in this proceeding. *Nearly 13 years ago*, the Commission properly declined to rule on Petitioners' discrimination and shortfall claims—the former because it involved disputed and/or undeveloped factual issues; the latter because it was moot.[67] The Commission also declined to address hypothetical issues about possible tariff amendments because doing so was not necessary to assist the referring court.[68] And *nearly a decade ago*, the Commission again declined to entertain Petitioners' discrimination and shortfall claims in the renewed referral proceeding, emphasizing that its "goal" was "to assist the referring court," which had asked the agency "to revisit the issue previously presented," and did "not expand the scope of the issue previously presented."[69]

Now, 20 years after the filing of the 1996 Petition for Declaratory Relief and more than nine months after the Commission publicly disclosed that a decision resolving the proceeding was on circulation, the Commission seeks comments on seven new issues pertaining to events alleged to have occurred two decades ago, under a tariff that was rescinded some 15 years ago.[70] Given the passage of so much time (for which Petitioners are largely responsible), combined with Petitioners' flagrant misconduct, it would be arbitrary, capricious and a clear abuse of discretion for the Commission to address the new questions posed. This is all the more true,

---

[67] *2003 Order* ¶ 18 n.87 & ¶ 20 n.94.

[68] *Id*. ¶¶ 13-15.

[69] *January 2007 Order* ¶¶ 2-3.

[70] *See Detariffing of Long Distance Telephone Industry to Become Effective at the End of the Month*, 2001 WL 838742 (FCC July 25, 2001).

however, in light of the Commission's prior refusal to address issues outside the scope of the referral, and its prior ruling making clear that it would not do so in the renewed referral.

No changed circumstances justifies such an about-face. To the contrary, after the *January 2007 Order* made clear that the Commission would not address issues outside the scope of the referral, the district court rejected Petitioners' request to modify the referral.[71] It is thus indisputable that resolution of the issues that Petitioners and 800 Services have recently raised will not "assist the referring court."[72]

Indeed, not only is the Commission's decision to entertain these requests flatly inconsistent with its prior rulings, that decision arbitrarily and capriciously *rewards* Petitioners for their egregious misconduct over the course of the past decade. In its *January 2007 Order*, the Commission stated that it would not expand the scope of the proceeding and, as Petitioners' then-contemporaneous filings reflect, they clearly understood that to be the case.[73] The Commission also noted that the section 2.1.8 issue had already been "extensively briefed by the parties" and it instructed the parties that their filings "should be informed by this reminder as to the scope of the matter presented here."[74] It thus afforded Petitioners a brief extension to file what should have been their last submission—*i.e.*, their reply comments on the scope of section 2.1.8. Rather than abide by those instructions, Petitioners have defied them in every way imaginable.

In addition to repeatedly seeking reconsideration of the *January 2007 Order* and/or simply ignoring it with new motions to expand the proceeding, Petitioners went so far as to

---

[71] *See supra* at p. 9 & notes 31-32.

[72] *January 2007 Order* ¶ 3.

[73] *See supra* at pp. 9-11.

[74] *January 2007 Order* ¶ 3.

submit a fabricated document purporting to represent the views of another federal agency (the IRS) in order to induce the Commission to address the shortfall imposition claim. They have also repeatedly sought to avoid a decision on the one issue that was actually referred to the Commission and that remains pending. Thus, they have, at various times, unilaterally declared the section 2.1.8 issue to have been resolved in their favor and have purported to foreclose further comments on it, while, at other times, they have advanced patently unreasonable claims that the section 2.1.8 issue is moot—only to comment again on that very issue whenever they felt like doing so. Indeed, despite the Commission's observations that the issue before it was "limited" in scope and had already been the subject of extensive briefing,[75] Petitioners and Tips have made numerous separate submissions (not including Mr. Inga's many emails to Commission staff), totaling thousands of pages, since that order was issued.

AT&T has strenuously objected to these efforts to raise extraneous issues and, based on those objections, it did not join issue on the merits of the shortfall imposition and discrimination claims.[76] AT&T also has repeatedly asked the Commission to impose limits on Petitioners' apparently endless stream of repetitive, vexatious and inflammatory filings and/or to resolve the matter promptly—all to no avail.[77] Under these circumstances, it would be capricious to entertain Petitioners' new requests for declaratory rulings.

---

[75] *See id.* ¶¶ 2-3.

[76] *See*, *e.g.*, Reply to Petitioners' Request for Combining Declaratory Rulings and Extension of Time to File Reply Comments, *Expedited Consideration for Declaratory Rulings On The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; DA-06-2360; WC Docket No. 06-210, at 2 (filed Jan. 10, 2007) ("AT&T 1/10/07 Reply") (Tips' request was an improper "ploy by Mr. Inga to have the Commission consider issues that petitioners deliberately chose to litigate by filing a complaint with the District Court"). *See also* 47 U.S.C. § 207 (election of remedies).

[77] *See, e.g.*, AT&T's Motion for Sanctions Against Mr. Alfonse Inga And Petitioners, *Expedited Consideration for Declaratory Rulings On The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, WC Docket No. 06-210 (June 12, 2007) ("AT&T 6/12/07 Motion for Sanctions").

B. Even If The Commission Entertains Them, The Declaratory Ruling Requests Should All Be Rejected.

For all of the reasons stated above, it would be improper for the Commission to entertain the issues raised in the declaratory ruling requests. However, to the extent the Commission nevertheless reaches the merits of those issues, it would also be error to resolve those issues in favor of Petitioners and 800 Services.

Declaratory Ruling Request I

> "Did AT&T violate the FCC's Oct 23rd 1995 Order by not allowing its customers to maintain for [a] minimum of 3 years its pre June 17th 1994 terms and conditions by not allowing petitioners to use the discontinuation without liability provision under Tariff No. 2., on its 3 years CSTPII/RVPP (EBO) plan commitment?"[78]

This issue falls outside the scope of the district court's referral and in all events cannot be resolved through a declaratory ruling proceeding because it relies on factual assertions that (1) have been resolved adversely to 800 Services in a final judicial decision, and (2) are undeveloped (and would likely be disputed) as to Petitioners. Moreover, the Commission's *October 1995 Order*[79] is utterly irrelevant with respect to the issues that Petitioners improperly seek to raise.

The *July 11 Petition* that sets forth this issue discusses the facts of the 800 Services case at length.[80] But any claim that 800 Services had regarding its CSTP II plans was extinguished by

---

[78] Declaratory Ruling Request I can be found in Petitioners' *July 11 Petition* and in a separate request for declaratory ruling that 800 Services submitted to the Commission via email on or about June 2, 2016. *See July 11 Petition* at 1 (noting that three of the declaratory ruling requests in the *July 11 Petition* were also included request for declaratory relief that was submitted by 800 Services via email on or around June 2 or 3, 2016). That earlier request appears to have been filed in the docket on June 7, 2016. *See 800 Services June 2 Petition* at 6. The *July 11 Petition* states that the three declaratory ruling requests were already filed jointly by "petitioners," which is presumably a reference to Petitioners (*i.e.*, the Inga Companies) and 800 Services, collectively. Thus, while the August 11, 2016 *Public Notice* does not mention 800 Services, AT&T has responded to those three requests on the assumption that Petitioners and 800 Services have both sought rulings on those issues.

[79] Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd. 3271 (1995) ("*October 1995 Order*").

[80] *See*, *e.g.*, *July 11 Petition* at 3 ("The **controversy** is whether *800 Services, Inc.'s* restructured plans could be restructured again within its 3-year commitment") (second emphasis added); *id.* ("Judge Politan's decision was erroneously based upon *800 Services, Inc.* not having a restructured plan") (emphasis added); *id.* at 7 (arguing that

(footnote continued on next page . . .)

Judge Politan's 2000 decision dismissing all of 800 Services' claims and awarding AT&T a judgment of $1.782 million plus pre-judgment—$1.4 million of which was for shortfall and termination charges. As part of that decision, the Court addressed the history of 800 Services' dealings with AT&T including its 1994 decision to subscribe to a $3 million CSTP II Plan.[81] The Court also discussed 800 Services' obligations under AT&T's tariff and determined that the shortfall and termination charges were due and owing.[82] That decision was subsequently upheld by the Third Circuit in 2001 and is now final.[83]

The Commission is not a forum for re-litigating the final judgments of federal district courts.[84] Consequently, any decision on the issues raised will plainly be moot as to 800 Services, because that company is precluded from pursuing any claim against AT&T regarding the imposition of shortfall and termination charges. Accordingly, resolution of the first request for declaratory ruling cannot "terminate a controversy or remove uncertainty" with respect to 800 Services.[85] It would therefore be arbitrary, capricious and an abuse of discretion for the Commission to do so at the behest of 800 Services.[86]

Judge Politan's "knowledge of tariff law and the carrying forward of the terms and conditions was more of a tariff interpretation beyond his expertise").

[81] *2000 Politan Decision* at 8.

[82] *Id*. at 24.

[83] *800 Services, Inc. v. AT&T Corp.*, 30 Fed. App'x 21 (3rd Cir. 2002).

[84] *See, e.g., Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800-01 (7th Cir. 2000) ("[C]ollateral attack, especially in civil cases, is disfavored because of the social interest in expedition and finality in litigation. A collateral attack on a final judgment is not a permissible substitute for appealing the judgment within the time, standardly 30 days, for appealing the judgment of a federal district court."); *Snell v. Cleveland, Inc.*, 316 F.3d 822, 827 (9th Cir. 2002) (quoting *Bell*); *Blumberg v. Berland*, 678 F.2d 1068, 1070 (11th Cir. 1982) ("A final judgment on the merits precludes the parties and their privies from relitigating issues that were or could have been raised in the action.").

[85] Perhaps in recognition of this, the *Public Notice* does not refer to 800 Services, despite the fact that its name appears first in the filings the Notice identifies and the July 11, 2016 filing discusses the facts of 800 Services' particular litigation with AT&T.

[86] Moreover, any ruling on this, or any of the other moot issues raised by Petitioners, would not survive appeal to the D.C. Circuit. While it is true there are no Article III "case or controversy" limits on the Commission's authority to issue declaratory rulings, both the Supreme Court and the D.C. Circuit have repeatedly held that, where an

(footnote continued on next page . . .)

With respect to Petitioners' CSTP II plans, the *July 11 Petition* does not state whether (and if so, when and how) Petitioners sought to use the discontinuation without liability provision. Nor does the *July 11 Petition* state when or how AT&T refused to permit Petitioners to do so. To the contrary, the filing states that "Judge Politan in the Inga Companies case was not confronted with the duration of the immunity."[87] Resolution of an issue in a petition for declaratory relief where the facts are not even asserted, much less agreed-upon as undisputed, is entirely inappropriate.[88]

Moreover, this issue (which related to the impact of the Commission's *October 1995 Order*) has no bearing on Petitioners. At their request, the district court ordered AT&T to permit the transfer of the plans from Petitioners to CCI in May 1995. Thus, anything that occurred with respect to those plans after that date, including the issuance of the *October 1995 Order*, did not affect Petitioners because the plans did not belong to Petitioners anymore; they had already been transferred to CCI. Further, in 1997, AT&T settled with CCI and all claims regarding the plans at issue were released. To the extent Petitioners have claims against CCI in connection with the

---

administrative agency issues a declaratory ruling on an issue that an Article III court cannot review because the underlying dispute is moot, the appellate court will simply vacate the declaratory ruling without addressing its merits. *See, e.g., A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329-330 (1961) (holding that the appellate court should vacate administrative order where mootness precludes judicial review by an Article III court that would otherwise be available "as of right"); *Radiofone, Inc. v. FCC*, 759 F.2d 936, 938 (D.C. Cir. 1985) (summarily vacating declaratory ruling that, because of mootness, could not be reviewed by an Article III court); *Hollister Ranch Owners' Ass'n v. FERC*, 759 F.2d 898, 901-02 (D.C. Cir. 1985) (same); *Tennessee Gas Pipeline Co. v. Federal Power Comm'n*, 606 F.2d 1373, 1382-83 (D.C. Cir. 1979) (same).

[87] *July 11 Petition* at 5.

[88] *See 2003 Order* ¶ 18 n.87 (declaratory relief inappropriate where factual issues are undeveloped or disputed, because further factual development should occur in the district court, in accordance "with petitioners' original choice of forum for this dispute" and "the court's primary jurisdiction referral"); *see also* Mem. Op. & Order, *Cascade Utilities, Inc., AT&T Co. Petition for Declaratory Ruling*, 8 FCC Rcd. 781, 782 ¶ 11 (1993) ("When the fact are not disputed, the Commission has elected to grant petitions for [declaratory] rulings. However, such relief is not generally granted where, as in the present case, all relevant facts are not clearly developed and essentially undisputed."); Report & Order, *Amendment of Part 73 of the Commission's Rules & Regulations to Regulate Fraudulent Billing Practices of Standard, FM & Television Broadcast Stations*, 1 F.C.C.2d 1068, ¶ 6 (1965) (holding that the Commission "does not deem it good practice to issue declaratory rulings in hypothetical situations where all of the facts which can affect a decision may not be present.").

release of any claims under the plans, that has nothing to do with AT&T. In fact, Petitioners pursued claims concerning the settlement against CCI in a separate lawsuit in New Jersey Federal District Court, and lost.[89] Because the issue posed in this declaratory request is hypothetical or moot as to Petitioners, it would be arbitrary, capricious and an abuse of discretion for the Commission to resolve the issue for this reason as well.[90]

Finally, even if Petitioners and 800 Services had any cognizable interest in the resolution of this issue—and neither does—the *October 1995 Order* has no relevance to any issues, including those that Petitioners improperly seek to raise. As AT&T has previously explained, all that AT&T promised in the *October 1995 Order's* "grandfathering" provision was that, for a 12-month period, it would provide five days' notice before it made "any *change* to an existing term plan," and 14 days' notice for "*changes* to discontinuance without liability . . . or transfer or assignment of service."[91] In refusing to process the proposed CCI-to-PSE transfer, AT&T was not prospectively *changing* the plans; it was enforcing them in accordance with their pre-October 1995 terms. Thus, the *October 1995 Order*'s requirements governing *changes* to tariffs did not apply to AT&T's efforts to enforce its tariff. Nor has AT&T claimed that any post-October 1995 amendment to its tariff governed the resolution of any claim that Petitioners have asserted, properly or otherwise, in this proceeding or the district court proceeding.[92]

---

[89] *See* Complaint, *Winback & Conserve Program, Inc. v. Combined Companies, Inc.*, Civ. No. 98-3920, at 3 (D.N.J. Aug. 19, 1998) (Dkt No. 1) (Attached hereto as Ex. 4); Judgment, *Winback & Conserve Program, Inc. v. Combined Companies, Inc.*, Civ. No. 98-3920 (D.N.J. May 30, 2001) (Dkt No. 60) (entering judgment in favor of defendants on all counts after trial) (Attached hereto as Ex. 5).

[90] *See 2003 Order* ¶ 20 n.94 (resolution of moot or irrelevant issues inappropriate).

[91] *See* AT&T Response to Petitioner's Motion to Temporarily Suspend the Proceeding, WC Docket No. 06-210 (Feb 1, 2016) at 6; *see also October 1995 Order* ¶ 134 (emphases added).

[92] *See 2003 Order* at ¶¶ 14-15 (noting that, because AT&T had not argued that any revisions to its tariff that became effective after January 1995 governed this matter, Commission "[r]esolution of this issue is not necessary to assist the district court").

In the end, what petitioners are really arguing is that, when AT&T sought to enforce the then-effective tariff provisions governing discontinuance without liability or transfer of service (Section 2.1.8), "AT&T was obligated under that FCC Order [*i.e.*, the *October 1995 Order*] to file with the Commission a substantial cause pleading within 14 days if an AT&T customer objected to AT&T's interpretation of the discontinuation without liability provision and section 2.1.8."[93] This is patently absurd. The substantial cause test applies only when a dominant carrier seeks to change its existing tariff in a way that affects current subscribers.[94] AT&T was not seeking to change its tariff, but rather to enforce it.[95]

Accordingly, for all of these reasons the Commission should decline to address Declaratory Ruling I or, if it does address it, it should rule that AT&T did not violate the *October 1995 Order* by attempting to enforce the terms of its tariff over the objection of a customer.

Declaratory Ruling Request II

> "AT&T under the CSTPII/RVPP Enhanced Billing Option billed petitioner's end-user locations were inflicted shortfall and termination charges on petitioner's end-user locations far in excess of the discounts each end-user location was receiving. Under AT&T's Tariff No 2 within section 3.3.1Q it states for billing purposes AT&T can only remove the discounts. Therefore, would exceeding the location discount constitute an illegal AT&T billing remedy and thus regardless whether the charges were permissible AT&T wouldn't be able to rely upon its charges?"[96]

---

[93] *See July 11 Petition* at 9.

[94] *In the Matter of RCA American Communications, Inc.*, 86 FCC.2d 1197, 1202-03 (1981); *In the Matter of RCA American Communications, Inc.,* 94 FCC.2d 1338, 1340 (1983).

[95] Also absurd is the claim that 800 Services and Petitioners only recently became aware of the *October 1995 Order*. The order was well publicized at the time it was issued and, indeed, both Petitioners and 800 Services have cited to this order in their earlier pleadings in this proceeding. *See* AT&T 7/1/16 *Ex Parte* at 4-5 (identifying prior instances where the *October 1995 Order* was referenced by Petitioners and 800 Services).

[96] Like Declaratory Ruling Request I, Declaratory Ruling Request II can be found in Petitioner's *July 11 Petition* and in a separate request for declaratory ruling that 800 Services submitted to the Commission via email on or about June 2, 2016. *See supra* note 78.

Because the propriety of AT&T's imposition of shortfall charges on CCI's end-user customers was an issue that the Commission expressly deemed moot some 13 years ago,[97] and because the Commission clearly refused to expand the scope of the renewed referral proceeding to entertain this issue a decade ago,[98] it would be arbitrary, capricious and an abuse of discretion for the Commission to entertain this particular claim now.[99]

In addition, for the reasons just discussed with respect to Declaratory Ruling Request I, this issue is hypothetical or academic insofar as both 800 Services and Petitioners are concerned. Having litigated and lost issues pertaining to the imposition of shortfall charges, 800 Services has no right to re-litigate those issues before the Commission and can have no conceivable interest in the resolution of this issue now. Similarly, because Petitioners' plans were transferred to CCI in May 1995 pursuant to a court order that Petitioners themselves sought, and because they litigated and lost their subsequent claims against CCI,[100] the propriety of shortfall charges imposed on plans that belonged to CCI in 1996 cannot affect any legitimate interest of Petitioners. Because the Commission has previously recognized that it is inappropriate to resolve moot issues, it would be arbitrary, capricious and an abuse of discretion to resolve this issue, which is moot with respect to the entities now seeking declaratory relief.[101]

---

[97] *2003 Order* ¶ 20 n.94.

[98] *January 2007 Order* ¶ 3.

[99] *See supra* § IIA.

[100] *See supra* at p. 22 & note 89.

[101] Nearly a decade ago, the Inga Companies claimed that Florida taxing authorities were interested in this issue. *See* Request for Combining Declaratory Rulings and Extension of Time to File Reply Comments, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; DA-06-2360; WC Docket No. 06-210, at 2 (filed Jan. 5, 2007). But, as AT&T explained then, it had received no inquiries from Florida with respect to the CCI shortfall charges, and any claim for taxes would have been barred (in 2007) by the state's five-year statute of limitations. *See* AT&T 1/10/07 Reply at 2, 6 & n.1. In the intervening decade, Florida has filed no document in this proceeding (or the Tips' proceeding) expressing any interest in the shortfall issue. And Tips' prior representations about the interest of the IRS proved to be false. *See* AT&T 6/12/07 Motion for Sanctions at 14-18; AT&T 7/18/07 Reply in Support of Sanctions at 1-11.
(footnote continued on next page . . .)

Moreover, Petitioners previously elected to pursue this issue in the district court. In response to a complaint that AT&T had filed at the FCC in 1996 asserting that one Petitioner (Winback & Conserve) had "slammed" the accounts of certain end users by adding them to its CSTP II plan without the end users' consent, Winback filed a Counter Complaint, alleging that AT&T's imposition of shortfall charges on CCI's end-users violated 47 U.S.C. § 201(b). Winback, however, later withdrew that Counter Complaint because it elected to pursue that claim through a Supplemental Complaint filed in the district court case.[102] In response, the Commission then dismissed the Counter Complaint without prejudice.[103] Given that election, it would be arbitrary, capricious and an abuse of discretion for the Commission to now reverse course and decide that issue, especially given that the issue is still pending before the district court and the court has not sought the Commission's input.

In all events, the claim that AT&T violated its tariff by seeking to impose shortfall charges on CCI's end-user customers is groundless. The second sentence of the applicable tariff provision clearly provided AT&T with the right to allocate and bill shortfall charges to end-users. Indeed, in his 2000 decision in the 800 Services case, Judge Politan expressly noted that AT&T had this right under its tariff.[104] Further, AT&T's tariff does not state that reduction of the applicable discounts is AT&T's *only* remedy as it relates to end-user locations.

Petitioners' claims to the contrary cannot be squared with the plain language of the relevant tariff provision. Specifically, the tariff provided:

Unsubstantiated and facially implausible claims that a federal or state taxing authority might be interested in AT&T's imposition of shortfall charges on CCI end-users 20 years ago does not create a controversy or any uncertainty warranting issuance of a declaratory ruling.

[102] *See* Notice of Withdrawal, *AT&T Corp. v. Combined Companies, Inc.*, File No. 97-02 (Feb. 3, 1997).

[103] *AT&T Corp. v. Winback & Conserve Program, Inc.*, 2001 WL 951018, 16 F.C.C.R. 16074 at n.28 (Aug. 23, 2001).

[104] *See Politan 2000 Decision* at 7.

> Shortfall and/or termination liability are the responsibility of the Customer. Any penalty for shortfall and/or termination liability will be apportioned according to usage and *billed to the individual locations designated by the Customer for inclusion under the plan*. For billing purposes, such penalties shall reduce any discounts apportioned to the individual locations under the plan.[105]

Under this language, billing to the individual locations was required (not merely permitted as an option). Such billing therefore could not have been an "illegal billing remedy." AT&T plainly could "rely on" on a remedy that it was required to use. And that requirement makes clear that the reduction of discounts apportioned to the individual locations was not—and could not have been—AT&T's exclusive remedy.

Moreover, the fact that shortfall liability was the responsibility of the CSTP II customer (*i.e.*, CCI in June 1996) does not override the tariff's plain and unambiguous language providing that shortfall "liability will be . . . billed to the individual locations." Because enforceable volume commitments were an essential *quid pro quo* for the discounts that resellers obtained (as the D.C. Circuit recognized[106]) and used to attract their end-user customers, billing shortfall charges to end-users served as a powerful inducement for resellers like Petitioners to comply with their obligations. At the same time, in light of the language specifying that shortfall "liability" was ultimately the "responsibility" of the CSTP II customer, AT&T subsequently removed the charges after they were billed and did not attempt to collect those charges from CCI's end-users. Accordingly, AT&T did not violate its tariff by imposing shortfall charges on end-users that exceeded the discounts each end-user location was receiving.

Declaratory Ruling Request III

> "For plans that were ordered prior to June 17th 1994 and requested under the discontinuation without liability provision, interpret the duration of the immunity period

[105] AT&T Tariff No. 2, § 3.1.1.Q (emphasis added).

[106] *AT&T Corp.*, 394 F.3d at 934.

from being charged pro rata shortfall and termination charges on a CSTPII/RVPP (EBO) plan commitment of 3 years?"[107]

This issue, like the prior issues, is also hypothetical or academic insofar as both 800 Services and Petitioners are concerned. Having litigated and lost issues pertaining to the imposition of shortfall and termination charges, 800 Services can have no conceivable interest in the resolution of this issue now. Similarly, Petitioners' plans were transferred to CCI in May 1995 pursuant to a court order that Petitioners themselves sought, and they litigated and lost their subsequent claims against CCI. Further, Petitioners have not shown that AT&T imposed shortfall and termination charges on any plans that Petitioners owned, much less that such charges were imposed during any period of "immunity" that any Petitioner-owned plans possessed. Petitioners thus have no apparent interest in a ruling determining the "duration" of any asserted "immunity period."

Indeed, this issue is relevant to the renewed referral proceeding only insofar as it relates to Petitioners' mistaken theory that PSE was not required, under section 2.1.8, to assume CCI's obligations for shortfall and termination liability because all of Petitioners' and CCI's plans were pre-June 1994 plans and thus "immune" from such liability. This theory, however, suffers from numerous flaws. As AT&T explained nearly a decade ago in its initial comments in the renewed referral proceeding,[108] Petitioners' "immunity" theory is mistaken. A customer had the right to discontinue a CSTP II Plan without liability (*i.e.*, without incurring shortfall and termination charges) if it met certain conditions set forth in Tariff F.C.C. No. 2, Section 3.3.1.Q.4. While CSTP II Plans in effect on or prior to June 17, 1994 (*i.e.*, pre-June 1994 CSTP II Plans) were

[107] Like Declaratory Ruling Requests I and II, Declaratory Ruling Request III can be found in Petitioner's *July 11 Petition* and in a separate request for declaratory ruling that 800 Services submitted to the Commission via email on or about June 2, 2016. *See supra* note 78.

[108] *See* AT&T 12/20/06 Comments at 31-34.

subject to fewer conditions for discontinuance without liability than CSTP Plans that became effective after June 17, 1994, they were in no way "immune" from shortfall and termination charges. Indeed, if a pre-June 1994 Plan holder discontinued its plan but did not meet the conditions to qualify for discontinuance without liability, termination charges would be incurred.[109] Similarly, if a pre-June 1994 Plan holder did not meet its annual revenue commitment (or discontinue without liability) before the end of any year of the plan, shortfall charges would be incurred.

Moreover, Petitioners themselves recognized this reality in the initial motion for preliminary injunction, where they argued that pre-June 17, 1994 plans "may never have shortfall charges imposed, *as long as the plans are restructured prior to each one-year anniversary*."[110] Thus, even pre-June 17, 1994 plans were subject to potential liability for shortfall, as a judgment later entered against PSE for failing to restructure its CSTP II plans on a timely basis confirms.[111] This potential liability was thus one of the obligations that a transferee, like PSE, had to agree in writing to accept under section 2.1.8.

Finally, if a customer properly exercised its right to discontinue an existing CSTP II Plan by replacing the existing plan with a new plan (the tariff language expressly required the replacement plan to be a "new" plan), the discontinued plan would end, and the new plan would

[109] *See* AT&T Tariff F.C.C. No. 2, Section 3.3.1.Q.3 (9th revised page 61.19) (AT&T 12/20/06 Comments, Ex. K).

[110] Joint Motion for Expedited Consideration, *Joint Petition for Declaratory Ruling on The Assignment of Accounts (Traffic) Without The Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, Internal File No. CCB/CPD 96-20, at 2 (Jul. 15, 1996); *see* 1996 Petition for Declaratory Ruling at iii, 3, 14-15; *see also* Joint Brief In Support of Plaintiffs' Motion For Temporary Restraining Order & Mandatory Preliminary Injunction, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908, at 12 n.8 (D.N.J. Feb. 24, 1995) (*"Plaintiffs' 2/24/95 Joint Brief"*) (acknowledging that, under AT&T's tariff "a CSTP II customer may cancel without liability if it meets specified alternatives") (Excerpt attached hereto as Ex. 6).

[111] *See* AT&T's 7/1/16 Ex Parte Letter, Ex C.

start, effective as of the date of discontinuance.[112] Accordingly, if either Petitioners or 800 Services had discontinued without liability a pre-June 1994 CSTP II plan by replacing the plan with a *new* CSTP II Plan, the new plan would not be a "CSTP II Plan in effect on or prior to June 17, 1994."

Declaratory Ruling Request IV

> "The Inga Companies plans on January 30, 1995, under tariff section 2.1.8., directly transferred end-user locations without the plan being transferred to Public Service Enterprises (PSE). Did AT&T violate section 2.1.8(c) by not transferring the Inga Companies designated locations due to AT&T's conceded failure to issue a written denial within 15 days?"[113]

This question falls outside the scope of the referral, is an improper candidate for resolution through a declaratory ruling, and is in all events legally mistaken.

First and foremost, it is simply extraordinary that Petitioners have raised this issue at this stage of the proceedings. In 1995, Petitioners sought and obtained an injunction compelling AT&T to effectuate the transfer of their plans to CCI, thereby divesting themselves of the ownership of those plans.[114] They also obtained an injunction compelling AT&T to effectuate the CCI-to-PSE transfer, defended the propriety of that injunction before the Third Circuit (which reversed), then litigated the validity of the CCI-to-PSE transfer before the Commission; watched the Commission litigate the validity of that transfer before the D.C. Circuit; and then renewed their contentions concerning that transfer in the renewed referral proceeding. The most

[112] *See* Tariff No. 2, section 3.3.1.Q.4 (7th Revised Pages 61.19.1 and 19.2) (stating at multiple points that the existing plan is to be replaced by a "new" plan), a copy of which is attached as Ex. 14 to AT&T's 12/20/06 Comments. Further, notwithstanding Petitioners' claims to the contrary (see *July 11 Petition* at 3-4), 800 Services did not dispute that its August 1994 plan was a new plan, which further supports AT&T's position that under the tariff a discontinued plan ended and the replacement plan was a new plan.

[113] Declaratory Ruling Request IV is found in the *June 30 Petition* where it is identified as "Declaratory Ruling I Question." *See June 30 Petition* at 3.

[114] Letter Opinion, *Combined Companies v. AT&T*, Civ. Action No. 95-908 (dated May 19, 1995) (Dkt No. 32) (See Group Discounts, Inc. filing in this proceeding where it is mislabeled as May 1996 decision) (posted Feb. 15, 2016).

basic notions of orderly process and principles of waiver preclude Petitioners from now seeking a declaratory ruling on a *different* transfer that they raised briefly over two decades ago but clearly abandoned by pursuing judicial relief based on the proposed CCI-to-PSE transfer. *See Thompson v. Armstrong*, 134 A.3d 305, 309 (D.C. 2016) (by failing to raise a defense at an initial trial and appeal, defendant forfeited defense at a second trial on remand). Accordingly, it would be arbitrary, capricious and an abuse of discretion for the Commission to address such a claim now.

Second, factual issues preclude such a ruling. In their motion for a preliminary injunction in 1995, Petitioners and CCI claimed that CCI's president, Mr. Shipp, had submitted requests to AT&T on January 30, 1995 seeking, as agent of Petitioners, to transfer the plans to PSE.[115] But the exhibit attached to Mr. Shipp's declaration in support of that claim does not substantiate it; to the contrary, that exhibit contains transfer of service forms from CCI (as former customer) to PSE that are dated January 10, 1995—*i.e.*, before AT&T refused to process the CCI-to-PSE transfer.[116] Nor have Petitioners provided any substantiation for their claim that AT&T failed to respond to the asserted direct transfer between Petitioners and PSE within 15 days of this asserted request. In fact, by letter dated February 6, 1995, AT&T's counsel notified counsel for Petitioners that AT&T would object to any attempt by Petitioners to transfer substantially all of the traffic on their plans to a transferee that would not agree to assume all liabilities.[117]

---

[115] *See Plaintiffs' 2/24/95 Joint Brief* at 13; *see also* Affidavit of Larry G. Shipp In Support of Plaintiffs' Application for an Order to Show Cause With Temporary Restraints, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908, at ¶¶ 32-33 (D.N.J. Feb. 24, 1995) (Dkt No. 5) ("Shipp 2/24/95 Aff."). The Shipp 2/24/95 Aff. (with exhibit I) is attached hereto as Exhibit 7.

[116] *See* Shipp 2/24/95 Aff. at Exhibit I.

[117] *See* Letter from F. Whitmer (AT&T Counsel) to H. Curtis Meanor (Inga Companies counsel) (Feb 6, 1995) (Ex. X to Petitioners' Request for Declaratory Rulings, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210 (posted Nov. 22, 2006)).

In all events, section 2.1.8 required that when an existing customer sought to transfer WATS to a new customer, the new customer had to "agree[] to assume all obligations of the former Customer at the time of transfer." A request to transfer only "end-user locations without the plan" clearly runs afoul of the requirement under section 2.1.8 that **all obligations** (which includes the associated plan obligations) must also be transferred. Consequently, the alleged traffic-only transfer from Petitioners to PSE would have been barred for the same reasons as the proposed CCI to PSE transfer.

Finally, even if it were undisputed that AT&T had failed to issue a written denial of the "direct" transfer within 15 days, this would not bar AT&T from objecting to the alleged transfer. As AT&T has previously explained, the 15 day period referenced in the tariff did not operate as a "statute of limitations" and did not require AT&T to process a transfer that did not comply with the requirements of section 2.1.8, including its requirement that the transferee agree to accept "all" obligations of the transferor.[118] Given that PSE did not agree to accept those obligations, there was never a valid transfer request, and AT&T was not required to process that request.[119]

Declaratory Ruling Request V

> "In January 1995 did AT&T's Tariff No 2 Section 3.3.1Q4 allow petitioners to move the designated end-user locations by deleting the locations from petitioners plans and adding those locations to PSE's plan) and thus would it result in plaintiff's ability to keep its plans and its revenue and time commitments associated with the non-transferred plans?"[120]

---

[118] *See* Brief of AT&T Corp. in Opposition to Plaintiffs' Motion to Lift Stay and to Schedule Damages, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908, at 20-21 (D.N.J. Mar. 21, 2016) (Dkt No. 191) ("AT&T 3/21/16 Op. Br.") (Attached hereto as Ex. 8); AT&T 12/20/06 Comments at 34-35; AT&T's Response to Petition to Expedite, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210, 1-2 (May 14, 2008) ("AT&T 5/14/08 Response").

[119] *See* AT&T's 3/21/16 Op. Br. at 20-21; AT&T's 12/20/06 Comments at 34-35; AT&T 5/14/08 Response at 1-2.

[120] Declaratory Ruling Request V is found in the *June 30 Petition* where it is identified as "Declaratory Ruling II Question." *See June 30 Petition* at 4.

This issue falls outside the scope of the district court referral and is an improper candidate for resolution through a declaratory ruling. In addition, principles of res judicata bar adoption of this theory.

As an initial matter, section 3.3.1.Q.4 of AT&T Tariff F.C.C. No. 2 was titled "Cancellation or Discontinuance of AT&T's 800 Customer Specific Term Plan II-Without Liability." As its title reflects, section 3.3.1.Q.4 established the conditions under which a Customer could cancel or discontinue a CSTP II Plan without liability for termination and shortfall charges; it did not provide a process for deleting locations or for transferring service from one customer to another.

Instead, it appears that Petitioners intended to invoke what they have sometimes called "Bullet 4" of section 3.3.1.Q. Their request for a declaratory ruling concerning this provision is, if anything, more improper than Declaratory Ruling Request IV. First, having pursued judicial and administrative relief on the basis of an entirely different transfer, Petitioners necessarily waived any claim that they should have been allowed to effectuate a transfer through a "delete and add" mechanism. Second, Petitioners do not even claim that they ever made a request to effectuate such a transfer, much less that AT&T refused such a request.

Third, the Commission relied on a directly analogous theory in seeking to justify its original conclusion that section 2.1.8 did not govern traffic-only transfers, and the D.C. Circuit squarely rejected that theory. Specifically, the Commission reasoned that the CCI-to-PSE transfer was "effectively" the same as two requests: "one by CCI to AT&T to decrease its traffic; and another by PSE to AT&T to increase its traffic."[121] Rejecting this logic, the D.C. Circuit pointed out that "proceeding by analogy does not change the fact that CCI and PSE did request a

[121] *2003 Order* ¶ 9.

transfer . . . instead of dropping and adding traffic in separate transactions."[122] And, the court concluded that allowing CCI and PSE to proceed in that fashion would completely undercut the purpose of section 2.1.8.[123]

Declaratory Ruling Request V thus asks the Commission to issue a ruling flatly at odds with the D.C. Circuit's holding. Principles of res judicata plainly bar the Commission from ruling that Petitioners were entitled "to move the designated end-user locations by deleting the locations from petitioners[']plans and adding those locations to PSE's plan." Such a ruling would completely undercut both the purpose of section 2.1.8 and the D.C. Circuit's holding.

Declaratory Ruling Request VI

> "Did AT&T's complete shutdown of section 2.1.8 to all traffic only transfers, of any quantities of locations transferred, to prevent all traffic only, non-plan transfers, constitute an illegal remedy or any other violation of section 2.1.8?"[124]

This issue also falls outside the scope of the district court referral and is an improper candidate for a declaratory ruling proceeding because it involves factual disputes and is of merely academic concern.

In the current proceeding, the matter at issue is whether the proposed CCI-to-PSE transfer, in which substantially all of the traffic under a CSTP II Plan would be transferred without the related plan obligations, complied with the requirements of section 2.1.8. In the *June 30 Petition*, Petitioners and 800 Services claim that *after* AT&T refused to process the proposed CCI-to-PSE transfer in January 1995, they learned in June 1995 that AT&T had "shut down" all

[122] *AT&T Corp.*, 394 F.3d at 938.

[123] *Id*.

[124] Declaratory Ruling Request VI is found in the *June 30 Petition* where it is identified as "Declaratory Ruling III Question." *See June 30 Petition* at 5.

traffic-only transfers.[125] The *June 30 Petition* does not explain, however, how AT&T's conduct *after* the denial of the proposed CCI-to-PSE transfer could have affected Petitioners (or 800 Services).

Insofar as Petitioners assert that AT&T refused all traffic-only transfers after it denied the proposed CCI-to-PSE transfer, that assertion simply means that, after January 1995, AT&T treated all others no better than it treated Petitioners, CCI, or PSE in January 1995. Such equal treatment is not a basis for a discrimination claim. On the other hand, to the extent Petitioners suggest that, but for the alleged "shut down," they would have sought to transfer smaller quantities of locations in connection with the transfers at issue, they have provided no evidence that they ever tried to do so. Consequently, AT&T's alleged later refusal to process certain unspecified traffic only transfers under section 2.1.8 is irrelevant to Petitioners and 800 Services. Commission resolution of this issue is therefore unnecessary to resolve any controversy or to remove any uncertainty.

Moreover, Petitioners' assertions about how AT&T responded to requested traffic-only transfers after January 1995 involves undeveloped or disputed facts. Indeed, in connection with their discrimination claim, Petitioners made factual assertions about how AT&T handled traffic-only requests *before* it denied the CCI-to-PSE proposal, and the Commission concluded that declaratory relief is inappropriate where factual issues are undeveloped or disputed, and that further factual development should occur in the district court, in accordance "with petitioners' original choice of forum for this dispute" and "the court's primary jurisdiction referral."[126] The same reasoning applies to this request for declaratory relief.

---

[125] *See June 30 Petition* at 5.

[126] *2003 Order* ¶ 18 n.87.

Finally, even if Petitioners or 800 Services could show that, prior to the proposed January 1995 transfers at issue here, AT&T permitted some types of traffic only transfers under section 2.1.8, that would not establish that the subsequent enforcement of the tariff constituted an illegal remedy. Rather, at most it would show that in those earlier transactions, AT&T may have failed to strictly enforce its tariff, although no such conclusion could be reached without knowing, at a minimum, the nature of the transfers, *i.e.*, whether the particular traffic-only transfers would have completely undermined the purpose of section 2.1.8, as the proposed CCI-to-PSE transfer would have.[127]

Declaratory Ruling Request VII

> "Under the FCC's October 1995 Order AT&T was ordered to file with the Commission, within **6** days a **substantial** cause pleading to meet the **substantial** cause test when AT&T customers objected to the following 2 tariff sections: **1)** Transfer or Assignment of Service and **2)** Discontinuation With or Without Liability. Does AT&T's failure to comply with the FCC 1995 Order to timely file and meet the **substantial** cause test preclude it from raising any defenses under these tariff sections?"[128]

As AT&T explained above in response to Declaratory Ruling Request I, the *October 1995 Order* has no application to the matters at issue in this proceeding. That Order imposed certain filing requirements on AT&T in the case of proposed modifications to its tariffs. It has no application or relevance to AT&T's efforts to enforce pre-existing tariff provisions, which is all that is at issue here and before the district court. Further, there is nothing in the *October 1995 Order* that imposes on AT&T an obligation to make a substantial cause filing whenever a

[127] *See AT&T v. FCC*, 394 F.3d at 938 (noting that, "even if small scale transfers of traffic were outside the scope of Section 2.1.8, allowing *this* transaction to go through would create an obvious end-run around the unquestioned rule that new Customers had to 'assume all obligations' in transferring WATS *plans*.") (emphases in original).

[128] Declaratory Ruling Request VII can be found in Petitioners' *July 11 Petition* where it is identified as Declaratory Ruling Request IV. *See July 11 Petition* at 2. That request was subsequently modified and "corrected" in Petitioners' July 12, 2016 submission. *See* ADDITIONAL DECLARATORY RULING—Corrections to Yesterday's Filing, *Expedited Consideration for Declaratory Rulings on The Transfer of Traffic Only Under AT&T Tariff Section 2.1.8 and Related Issues*, CCB/CPD 96-20; WC Docket No. 06-210, at 2 (July 12, 2016).

AT&T disagrees that the applicable notice period is 6 days as opposed to 14 days. *See infra,* n.130.

customer raises an objection to an AT&T tariff provision. The substantial cause test applies only when a carrier seeks to make changes to its tariff, not when it seeks merely to enforce a currently effective tariff.[129] Finally, it is nonsensical to contend that the requirements of an FCC order that did not become effective until November 1995 could have any bearing on transfers that were proposed in late 1994 and early 1995.[130]

Accordingly, it would be arbitrary, capricious and an abuse of discretion for the Commission to find that AT&T's failure to abide by this non-existent requirement somehow resulted in AT&T waiving or otherwise forfeiting any of its defenses under its tariffs.

[129] *See supra* at note 94.

[130] There is also no merit to Petitioners' claim that under the *October 1995 Order*, the notice period for "substantial cause pleading" regarding a proposed tariff change relating to transfers or assignments of service or discontinuance without liability was 6 days as opposed to 14 days. As paragraph 134 of the *October 1995 Order* makes clear, for proposed tariff changes to term plan provisions concerning transfer or assignment and discontinuance with or without liability, AT&T was required to file such changes on 14 day's notice. *Id*. In all events, the *October 1995 Order* is wholly inapplicable to AT&T's efforts to enforce an existing tariff provision; it only applies to proposed changes in the tariff provisions themselves.

III. CONCLUSION

For the foregoing reasons, the Commission should deny the *June 30 and July 11 Petitions* for declaratory rulings.[131]

Respectfully submitted,

/s/ Christi Shewman
Christi Shewman
Gary L. Phillips
David L. Lawson
AT&T Services, Inc.
1120 20th Street, NW
Suite 1000
Washington, DC 20036
(202) 457-3090

Attorneys for AT&T Corp.

James F. Bendernagel, Jr.
Joseph R. Guerra
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Richard H. Brown
DAY PITNEY LLP
1 Jefferson Road
Parsippany, NJ 07054
(973) 966-6300

September 1, 2016

[131] The *Public Notice* does not refer to the June 23, 2016 declaratory ruling request that was filed by Petitioners and 800 Services, in which they asked the Commission to rule on whether AT&T "violate[d] its Tariff Number 2 by inflicting termination charges on the 5 petitioners CSTPII/RVPP (EBO) plans that were under 3 year commitments considering the non-disputed fact and AT&T's concession that these plans were never terminated?" Nevertheless, to the extent the Commission decides to address this request, the issue raised is moot with respect to both 800 Services as well as Petitioners. As explained above in the response to Declaratory Ruling Request I, Judge Politan's decision in 2000 resolved all issues regarding termination charges as they relate to 800 Services. Likewise, there are no termination charge issues regarding Petitioners. At no point did AT&T seek to impose termination charges on CSTP II plans owned by Petitioners. Further, any termination charges that were assessed against CSTP II Plans owned by CCI were settled in 1997. Finally, there is absolutely no merit to the suggestion that the CSTP II plans at issue were "immune' from all termination changes. While there were mechanisms pursuant to which such charges could be deferred or possibly avoided, the potential for liability was real as evidenced by the fact that companies like PSE incurred such charges. *See AT&T July 1 Ex Parte*, Ex. C.

Exhibit 1

ARLEO & DONOHUE, L.L.C.
ATTORNEYS AT LAW
622 Eagle Rock Avenue
West Orange, NJ 07052
Tele: (973) 736-8660 Fax: (973) 736-1712

FAX COVER SHEET

To: Richard Brown, Esq.

Fax Number: 973-966-1015

From: Frank P. Arleo, Esq.

Date: March 29, 2007

Re: Combined Companies, Inc. et al. v. AT&T

Number of pages including cover sheet: 12

Original to follow by mail: Yes (x) No ( )

( ) FYI ( ) URGENT (x) FOR REVIEW AND COMMENT ( ) PLEASE REPLY

NOTES/COMMENTS:

If all pages are not received, please call (973) 736-8660

ARLEO & DONOHUE, L.L.C.
ATTORNEYS AT LAW

Frank P. Arleo
Timothy M. Donohue

Of Counsel:
Jo Ann K. Dobransky
Dawn M. Donohue

622 Eagle Rock Avenue
Penn Federal Building
West Orange, NJ 07052
Telephone: (973) 736-8660
Fax: (973) 736-1712

March 29, 2007

Via ECF and Overnight Mail
Honorable Susan D. Wigenton, U.S.M.J.
United States District Court
M.L. King, Jr. Federal Bldg. & Courthouse
Room 2037
50 Walnut Street
Newark, New Jersey 07102

Re: Combined Companies, Inc., et al. v. AT&T
Civil Action No. 93-5456

Dear Judge Wigenton:

A. Introduction

This law firm represents plaintiffs Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc. ("the Inga Companies") in this matter. We are advised that Your Honor has been assigned this case as a result of Judge Bassler's recent retirement. We are writing to respond to defendant AT&T's recent letter in advance of the April 2, 2007 telephone conference.

In addition, we are writing to request that this Court also resolve a pending issue concerning the scope of Judge Bassler's primary jurisdiction referral to the FCC. AT&T has flip-flopped its position in a thinly veiled attempt to delay this matter at the FCC. Thus, this letter sets forth a critical issue that requires a resolution so that the FCC can fully and properly decide all non- disputed issues of this case.

As the Court is aware, this litigation began twelve years ago in 1995. Since the litigation has been so lengthy, we will first provide the Court with a brief background and a procedural history so that it will more clearly understand the issues. We will then address plaintiffs' issue concerning the primary jurisdiction referral. Finally, we will address AT&T's request for a modification of the Court's prior Order concerning an AT&T contact person.

B. Background and Status

1. History

The Inga Companies, Combined Companies, Inc. and Public Services Enterprises ("PSE") were aggregators of long distance service consisting of primarily toll free services. Aggregators group together businesses ("end-users") to aggregate substantial revenue in order to obtain a large volume discount from AT&T. The aggregators share the percentage of the discount with end-users in order to make a profit. The specific discount plan, CSTPII/RVPP, had a 28% discount due to its commitment of approximately $42 million in service per year. In practice, plaintiffs would advise AT&T to bill the end-user, e.g. at 20% off the base rate, and the extra 8% would then be paid by AT&T to plaintiffs' compensation account. In 1994, plaintiffs controlled 25% of this cottage industry that included approximately 100 competitors. AT&T was under FCC mandate to permit aggregation to benefit the public but AT&T did everything possible to stop it. All aggregators were put out of business by AT&T--- many settled----and this is the last case.

At the end of 1994, the Inga Companies and CCI co-owned the 28% plans. Another aggregator, PSE, brought suit against AT&T and obtained a much more favorable 66% discount plan (CT-516) despite only committing to $4.2 million per year of aggregate revenue, just one-

tenth of CCI and Inga's commitment. Plaintiffs had sought the same 66% plan as well as others but AT&T refused access to a contract even though plaintiffs qualified for it, which led to discrimination claims. In order to gain access to the deeper discounts, the Inga Companies and CCI requested that AT&T transfer most of its end-users to PSE's 66% AT&T discount plan, to earn the greater discount and profit on plaintiff's $54.4 million in business as of January 1995. A contractual arrangement with PSE permitted the Inga Companies and CCI to take the account traffic back from PSE. At the time of the January 1995 traffic-only transfer, AT&T's own testimony showed that the fiscal year revenue commitment had already been made and AT&T has conceded to the FCC that plaintiff's plans were grandfathered from shortfall and termination penalties in any event till **at least** June of 1996; which was 18 months after the denied traffic only transfer.

2. **Judge Politan's Rulings**

Not wanting to grant the larger discount to its largest aggregator, AT&T permanently denied the traffic only transfer and plaintiffs brought suit. In an initial May 1995 decision, Judge Politan ruled against AT&T, holding that the plans and all the corresponding account traffic was properly transferred. AT&T did not appeal this decision. However, a second transfer from CCI/Inga to PSE which transferred much of the traffic only without transferring the corresponding plans also was reviewed by Judge Politan. Initially, Judge Politan refused to rule on this traffic only transfer because AT&T represented to the Court that a pending FCC Transmittal 8179 would resolve the issue. The FCC advised AT&T that it was going to rule against it on Transmittal 8179 and therefore AT&T withdrew the transmittal instead of receiving an adverse determination. Judge Politan took testimony and ruled on this issue in March 1996.

Judge Politan ruled that a traffic-only transfer was permissible under the applicable AT&T Tariff Section 2.1.8. Judge Politan also understood that plaintiffs' plans revenue commitments remained with the plans which is the question Judge Bassler referred. In addition, Judge Politan also rejected AT&T's claim that it had a right to assess shortfall and termination ("S&T") charges, as the plans were ordered prior to June 17, 1994 and thus grandfathered. Consequently, the Court entered an injunction against AT&T.

3. **The Third Circuit Ruling**

In 1996, AT&T appealed Judge Politan's ruling to the Third Circuit. The Third Circuit did not address the merits of Judge Politan's decision; instead, the Third Circuit vacated Judge Politan's decision, holding that the FCC, and not this Court, had primary jurisdiction concerning the interpretation of Section 2.1.8. This case was stayed pending the referral to the FCC.

In 1997, plaintiffs filed a Supplemental Complaint under the same docket number, claiming that AT&T illegally inflicted S&T charges on end-user accounts in June of 1996, and March 1997, and instantaneously ended plaintiffs' business overnight. The Supplemental Complaint included only the Inga Companies and CCI; as by this time, PSE had dropped out of the litigation because its interests were being advanced by CCI/Inga. Ultimately, Judge Hedges added plaintiffs' Supplemental Complaint to the stay entered by the Third Circuit in 1996. AT&T also filed a Counterclaim to the Supplemental Complaint on shortfall charges that was also stayed.

4. **The FCC Ruling**

The original question referred by Judge Politan was whether or not Section 2.1.8 allowed traffic-only transfers. In 2003, the FCC finally ruled that Section 2.1.8 did not apply to **how**

"traffic only" could be transferred. Despite the fact that plaintiffs' used Section 2.1.8 to effectuate the traffic-only transfer, the FCC found that AT&T violated Section 203(c) of the Communications Act due to the fact that traffic-only transfers were allowed under a different section of AT&T's tariff (3.3.1.Q.4); thus, plaintiffs' traffic-only transfer was not prohibited. The FCC decision clearly shows, and it was briefed by the FCC to the DC Circuit, that the FCC only used Section 2.1.8 to determine which obligations transferred.

5. The D.C. Circuit's Ruling

AT&T appealed the FCC's decision to the D.C. Circuit. In 2005, the D.C. Circuit ruled that Section 2.1.8, as used by plaintiffs, was indeed the applicable traffic-only transfer tariff section. Thus, it affirmed that "traffic only" could be transferred—not just the entire plan. However, the D.C. Circuit stated that it was not deciding precisely which obligations were to be transferred on a traffic only transfer.

6. Judge Bassler's Ruling

After the D.C. Circuit ruled, plaintiffs filed a motion in this Court to lift the stay previously imposed by this Court. Plaintiffs argued that the stay should be lifted because the D.C. Circuit ruled that plaintiffs' traffic-only transfer was permissible, which was the sole question referred by the Third Circuit. Judge Bassler, nevertheless, denied plaintiffs' motion, finding that the D.C. Circuit's opinion left open a question of interpretation concerning which obligations were transferred on a traffic-only transfer. After the Third Circuit's referral the FCC Decision states that it had AT&T and plaintiffs additionally supplement the traffic only transfer issue with briefs on the shortfall issues.

Thus, Judge Bassler ordered plaintiffs back to the FCC to resolve this issue as well the shortfall issues and discrimination issues which AT&T argued to Judge Bassler were all open and best interpreted by the FCC.

7. **The Scope Of The Primary Jurisdiction Referral**

In referring the matter to the FCC, Judge Bassler stated:

> It is further ordered that plaintiffs, no later than August 1, 2006, file an appropriate proceeding under Part I of the FCC's rule to initiate an administrative proceeding to involve the issue of precisely which obligations should have been transferred under Section 2.1.8 of Tariff No. 2 **as well as any "other issues left open"** by the D.C. Circuit's opinion in AT&T Corp. v. Federal Communications Commission, 394 F.3d 933 (D.C. Cir. 2005).

Judge Bassler's referral is the issue which we need to raise with the Court. Specifically, in all previous filings with the FCC and Courts from 1995 through 2005, AT&T consistently took the position that the FCC should rule and interpret the tariffs covering all collateral issues regarding the improper infliction of shortfall and termination charges and whether AT&T discriminated against plaintiffs. To get the case referred by the District Court to the FCC, AT&T asserted to Judge Bassler that all issues were **interpretive,** so the District Court could not rule, and that there were no disputed issues of fact. After plaintiffs filed its FCC brief and AT&T evaluated plaintiffs' evidence on the shortfall issues and the discrimination issues, AT&T reversed its position before the FCC. Contrary to its original position, AT&T has now argued to the FCC that there are disputed issues of fact concerning the shortfall issues and the discrimination issues, despite providing the FCC with no evidence of disputed facts. Incredibly, AT&T also argued that the shortfall issues and the discrimination issues were no longer even before the FCC despite fully briefing all issues----just in case the FCC ruled. With the uncertainty of not knowing if the

FCC would resolve all "open issues", as requested by the District Court, plaintiffs asked the FCC to let plaintiffs know whether the FCC intended to resolve the shortfall issues and discrimination issues. On January 12, 2007, the FCC entered an Order stating that the shortfall and discrimination issues were not specifically referred to the FCC, even though these issues had been before it in the FCC's first ruling in 2003. Additionally, the FCC's General Counsel had stated in 2005 that plaintiffs could request whatever declaratory ruling it wanted whether or not it was eventually specifically referred by the District Court. Plaintiffs filed for reconsideration of the FCC's January 12, 2007 Order noting that its decision was issued prior to plaintiffs' scheduled reply brief and several additional briefs thereafter. The FCC has not issued a decision on plaintiffs' reconsideration request despite the fact that it is two months since the request. On Wednesday, March 28, 2007, the FCC was requested to provide a time when it would be deciding plaintiffs' reconsideration and to advise the parties by Friday March 30, 2007 to give this Court guidance on the scope of the referral.

On March 14, 2007 the IRS itself issued a primary jurisdiction referral to the FCC asking the FCC to resolve all the shortfall telecom issues to determine whether shortfall charges were permissible or not, so as to establish a taxable base to pursue AT&T on hundreds of millions in tax evasion charges; and several states are now also investigating AT&T.

The FCC advised the parties within its 2003 decision and also on January 12, 2007 that if there were disputed facts the District Court is the place to go to resolve the disputed facts. Plaintiffs filed supplemental briefs at the FCC demanding that AT&T state what the actual disputed facts were, instead of simply stating that there were disputed facts. AT&T has simply

continued to claim that there are disputed facts so the FCC won't rule, despite evidencing no disputed facts.

AT&T's newly minted "disputed facts" position is a thinly veiled attempt to have this matter languish in the FCC and hope there is no ruling. AT&T is in a catch-22. If the shortfall charges are permissible, AT&T owes many millions in taxes; if the charges are not permissible AT&T losses the telecom case. AT&T loses either way and, as a result, plaintiffs are being whip-sawed by AT&T's incredible new position that it does not want the shortfall issues decided at all. This Court has referred this case to the FCC for rulings on all issues. There was absolutely no reason to add in the referral: "**as well as any other issues left open**" ---if the traffic only transfer issue is all that the Court wanted interpreted by the FCC. However, the FCC will not rule on issues where there is a disputed issue of fact, stating in its previous opinion that questions of fact must be resolved by the District Court.

Our request to this Court is simple. We are requesting that this Court enter a Supplemental Primary Jurisdiction Referral Order clarifying that this Court's primary jurisdiction referral to include all discrimination issues and to advise the FCC that there are no disputed facts regarding all shortfall issues unless AT&T can show this Court that there are disputed facts. If there are legitimate disputed facts, the disputed facts could then be resolved by the District Court. Accordingly, we would like to discuss this issue further during the conference call so all interpretive issues can be expeditiously resolved at the FCC, which will allow this Court to further proceed.

C. **AT& T's Application**

AT&T has applied to the Court to modify a previous Court Order so as to change Mr. Inga's contact to an attorney involved in the litigation. In making its application, AT&T has totally mischaracterized the prior Court Order and why it was put into effect in the first place. Some background is needed for this Court to fully understand the issue.

In June of 1996, AT&T wrongfully applied shortfall charges on plaintiffs' end-users despite numerous statements in Judge Politan's May 1995 and March 1996 decisions which made it clear that the plans should be immune from such charges. As a result of AT&T's ill-advised behavior, thousands of plaintiffs' end-users were assessed charges which increased the average $300 phone bill to now include a $10,000 charge. AT&T directed these end-users to call plaintiffs' office on a toll-free number (at 20¢ a minute in 1996), after AT&T had already cut off all plaintiff's income by assessing the shortfall charges that Judge Politan found were not applicable to these plans. AT&T shrewdly advised end-users to call plaintiffs and asked to be removed from plaintiffs' plan. AT&T advised the end-user that it would then remove the charges that AT&T should not have assessed in the first place.

Recognizing the outrageousness of the tactic, Judge Politan ordered AT&T to have every single manager in every customer service office in the country to notify their staff not to call plaintiffs and to post it in a conspicuous place. In addition, Judge Politan provided an AT&T contact for plaintiffs. However, when plaintiffs attempted to reach the contact, they found that the number had been disconnected. AT&T subsequently misrepresented that the contact had been laid off, but that was not the case. Moreover, AT&T's counsel, Richard Brown, wrongfully designated himself as the contact.

AT&T had asserted that it did not attempt to change the contact until after the October 17, 2003 FCC ruling. That assertion is incorrect. AT&T's attempt to change the contact person occurred many months prior to the FCC's ruling. Moreover, AT&T had no authority at that time to change the contact person.

Once it finally recognized it was in violation of Judge Politan's Order, AT&T assigned Tom Umholtz as the new contact person, even though the original contact was still working at AT&T. Significantly, Judge Bassler did not place any prohibitions on what type of information plaintiffs could present to Mr. Umholtz.

Further, it is unnecessary to force plaintiffs to incur the expenses utilizing its counsel to forward information to AT&T's counsel. Indeed, petitioners have made numerous filings as a "public commenter" and filed its brief directly with AT&T in accordance with FCC guidelines.

In addition, the Court should note that some of the FCC's filings were made by one of plaintiffs' non-telecom companies, TIPS Marketing Services, Corp. ("TIPS"). The Court Order does not include TIPS.

Moreover, in its application, AT&T does not present the Court with any of the subject emails. The reason that AT&T does not present the content of these emails is that there is nothing in the emails that evidences the characterization that AT&T gives to the emails.

In short, AT&T has no evidence of a violation of the Court Order. Indeed, when AT&T asked Judge Bassler in 2003 to modify the August 1997 Order, Judge Bassler said he understood that the content of the emails contained settlement proposals and copies of Court and FCC filings. Appropriately, Judge Bassler did not modify the Order as to what could be stated.

In sum, AT&T has presented this Court with no legitimate reason to modify the Order and its hands are far from clean in this instance. Accordingly, AT&T's application should be summarily denied.

D. AT& T Should Provide A Courtesy Copy Of Previously Filed Briefs

We would also ask this Court to order AT&T to provide copies of both November 1995 briefs it filed with this District Court. The Pacer system does not have these 1995 filings on line and it would cost a considerable amount of time and money to retrieve them from the New Jersey District Court archive center in St. Louis, Missouri. Judge Politan's Decision states that these AT&T briefs explicitly answer, in favor of plaintiffs, Judge Bassler's referral question regarding precisely which obligations transfer on a traffic only transfer. The FCC has also been advised that these AT&T "concession" briefs are being attempted to be obtained, so the FCC is waiting on these AT&T briefs as well.

Respectfully,

ARLEO & DONOHUE, L.L.C.

By: _____
Frank P. Arleo

FPA:hm
cc: Richard Brown, Esq.
Alfonse Inga

Exhibit 2

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., a Florida corporation,	:	Civil Action No. 95-908(WGB)
WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. and 800 DISCOUNTS, INC., New Jersey corporations,	:	**ORDER**
Plaintiffs,	:	June 19, 2007
v.	:	
AT&T CORP., a New York corporation.,	:	
Defendants.	:	

WIGENTON, District Judge.

Plaintiffs Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc.'s request for a briefing schedule and/or modified referral to the FCC, as contained in their correspondence dated May 31, 2007, is **DENIED**.

The stay issued by the Honorable William G. Bassler's, U.S.S.D.J., Order of May 31, 2006 shall remain in effect.

SO ORDERED.

s/Susan D. Wigenton, U.S.D.J.

Exhibit 3

Frank P. Arleo (FPA0801)
ARLEO & DONOHUE, L.L.C.
622 Eagle Rock Avenue
West Orange, New Jersey 07052
(973) 736-8660 Fax (973) 736-1712
(FPA 0801)
Attorneys for Plaintiffs, Winback & Conserve Program, Inc.,
One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., a Florida corporation, and WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. and 800 DISCOUNTS, INC., New Jersey corporations, Plaintiffs, v. AT&T Corp., a New York corporation. Defendant.	Civil Action No. 95-908 (SDW) **ORDER** (Amended)

THIS MATTER having been brought to the Court by Arleo & Donohue, L.L.C., attorneys for plaintiffs Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc. ("plaintiffs") for an Order lifting the stay previously entered in this matter [166 & 168]; restoring this matter to the active calendar and entering partial summary judgment on the issues of liability only and the Court having considered the papers submitted in support thereof and in opposition thereto, oral arguments of counsel, and for good cause shown;

IT IS on this 19th day January, 2015; May

ORDERED that the stay previously entered in this matter be lifted and this matter returned to the active docket; and it is further Denied *

ORDERED that judgment be entered in favor of plaintiffs on the issue of liability with damages to be determined at a hearing on this issue; and it is further

ORDERED that a copy of this Order be served upon all parties within 5 days of the entry date.

Honorable Susan D. Wigenton, U.S.D.J.

* For the reasons set forth on the record on March 18, 2015.

** Order pertains to Docket Entries 166 and 168.

Exhibit 4

Lawrence S. Coven (L.S.C. 9572)
THE LAW OFFICES OF LAWRENCE S. COVEN
314 U.S. Highway 22 West
Suite E
Green Brook, N.J. 08812
(732) 424-1000
Attorneys for Plaintiffs, Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. and 800 DISCOUNTS, INC., New Jersey corporations,	
Plaintiffs,	**CIVIL ACTION NO.** 98cv3920(WHP)
v.	
COMBINED COMPANIES, INC., a Florida corporation,	**COMPLAINT and DEMAND FOR JURY TRIAL**
and	
LARRY SHIPP a citizen and resident of Florida,	
Defendants.	

Plaintiffs, WINBACK & CONSERVE PROGRAM, INC. ("Winback"), ONE STOP FINANCIAL, INC. ("One Stop"), GROUP DISCOUNTS, INC. ("GDI"), and 800 DISCOUNTS, INC. ("800 Discounts"), having their principal place of business at 55 Main Street, Little Falls, New Jersey (all of the foregoing parties hereinafter collectively referred to as the "plaintiffs"), by their attorneys, The Law Offices of Lawrence S. Coven, complaining of defendants, Combined

Companies, Inc. ("CCI" or "defendant"), having its principal place of business at 7061 W. Commercial Boulevard, Suite 5-K, Tamarac, Florida, and Larry Shipp ("Shipp" or "defendant"), residing at 3800 Sanctuary Dr., Coral Springs, Florida, (all of the foregoing parties hereinafter collectively referred to as the "defendants"), say:

PARTIES AND JURISDICTION

1. Plaintiffs are corporations organized and existing under the laws of the State of New Jersey, having their principal place of business at 55 Main Street, Little Falls, New Jersey.

2. Combined Companies, Inc., is a corporation organized and existing under the laws of the State of Florida having its principal place of business at 7061 W. Commercial Boulevard, Suite 5-K, Tamarac, Florida.

3. Larry Shipp is an individual citizen and resident of the State of Florida residing at 3800 Sanctuary Dr., Coral Springs, Florida, and is the beneficial outstanding owner and an officer, director and employee of Combined Companies, Inc. All activities set forth in this Complaint were directed by defendant Shipp and they are his acts and CCI's acts, completed and conducted for both his personal interest and CCI's interest.

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because there is diversity of citizenship among the plaintiffs and CCI and Shipp and amount in controversy exceeds Seventy-Five Thousand Dollars ($75,000.00), exclusive of interest and costs.

5. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events or omissions giving rise to these claims occurred in this District.

ALLEGATIONS COMMON TO ALL COUNTS

6. Plaintiffs repeat and reallege the allegations of Paragraphs One (1) through Five (5) as if the same were set forth at length herein.

7. Plaintiffs entered into a contract with Shipp and CCI which stated that (1) the plaintiffs would receive eighty percent (80%) of the total revenue payable to Shipp and CCI and (2) plaintiffs would receive any and all revenue, judgments or settlements generated as a result of litigation as co-plaintiffs against AT&T (Docket No. 95-908 (NHP), United States District Court, District of New Jersey). In exchange, plaintiffs transferred existing telecommunication customers to Shipp and CCI.

8. Plaintiffs, along with CCI and Shipp, filed a lawsuit (Docket No. 95-908 (NHP), United States District Court, District of New Jersey) against AT&T. This lawsuit related to a dispute over telecommunication servicing between AT&T and the parties to the present action, said dispute stemming from the contract between the plaintiffs and Shipp and CCI. Some time prior to August 8, 1997, CCI entered into a settlement agreement with AT&T relating to that action.

9. Plaintiffs were not a party to the settlement agreement mentioned above and received no payment pursuant to the settlement agreement.

10. On August 8, 1997, CCI's present complaint against AT&T was dismissed with prejudice.

11. On August 8, 1997, AT&T's present counterclaim against CCI was dismissed with prejudice.

COUNT ONE
Breach of Contract Under State Law and Federal Law

12. Plaintiffs repeat and reallege the allegations of Paragraphs One (1) through Eleven (11) as if the same were set forth at length herein.

13. Plaintiffs entered into the contract with Shipp and CCI relating to telecommunication services with AT&T.

14. Plaintiffs completed all of their obligations pursuant to the contract by transferring existing customers to Shipp and CCI.

15. Shipp and CCI breached their contractual obligations with plaintiffs when Shipp and CCI entered into the settlement agreement with AT&T because plaintiffs were not made a party to the agreement and received no payment pursuant to the agreement, even though plaintiffs were entitled to any and all proceeds of the settlement.

16. Shipp and CCI's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiffs' rights. Plaintiffs are therefore entitled to an award of exemplary and punitive damages.

17. As a result of the foregoing, plaintiffs have been damaged by not less than Fifty Million Dollars ($50,000,000.00).

WHEREFORE, plaintiffs demands judgment against defendants for damages in excess of fifty million dollars ($50,000,000.00), breach of contract damages, liquidated damages, unliquidated damages, actual damages, compensatory damages, consequential damages, continuing damages, direct damages, expectancy damages, foreseeable damages, future damages, general damages, prospective damages, special damages, punitive damages, attorneys fees,

together with interest and costs of suit, and legal relief as this Court deems just and proper under the circumstances.

COUNT TWO
Breach of Fiduciary Duty by Partner in Joint Venture
Under State Law and Federal Law

18. Plaintiffs repeat and reallege the allegations of Paragraphs One (1) through Seventeen (17) as if the same were set forth at length herein.

19. At all times relevant to the events underlying this action, plaintiffs, CCI and Shipp were partners in a joint venture.

20. This joint venture consisted of the sale of 800 traffic volume plans by the plaintiffs, CCI and Shipp.

21. As partners in this joint venture, CCI and Shipp owed a fiduciary duty to plaintiffs to protect and optimize plaintiffs' financial position and comply with all contractual obligations in all matters, business, legal and otherwise, related to the joint venture.

22. CCI and Shipp breached the fiduciary duty owed to plaintiffs when CCI and Shipp entered into the settlement agreement with AT&T because plaintiffs were not made a party to the agreement and received no payment pursuant to the agreement, even though plaintiffs were entitled to any and all proceeds of the settlement.

23. CCI and Shipp's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiffs' rights. Plaintiffs are therefore entitled to an award of exemplary and punitive damages.

24. As a result of the foregoing, plaintiffs have been damaged by not less than Fifty Million Dollars ($50,000,000.00).

WHEREFORE, plaintiffs demands judgment against defendants for damages in excess of fifty million dollars ($50,000,000.00), breach of contract damages, liquidated damages, unliquidated damages, actual damages, compensatory damages, consequential damages, continuing damages, direct damages, expectancy damages, foreseeable damages, future damages, general damages, prospective damages, special damages, punitive damages, attorneys fees, together with interest and costs of suit, and legal relief as this Court deems just and proper under the circumstances.

COUNT THREE

Unjust Enrichment/Quantum Meruit at the Prejudice and Expense of Plaintiffs Under State Law and Federal Law

25. Plaintiffs repeat and reallege the allegations of Paragraphs One (1) through Twenty-Four (24) as if the same were set forth at length herein.

26. Pursuant to the contract, plaintiffs were contractually bound to perform certain obligations at the request of CCI and Shipp, including but not limited to transferring customers to CCI and Shipp. Plaintiff reasonably expected to be paid for transferring said customers.

27. Plaintiffs performed all of their contractual obligations under the contract, thereby rendering valuable services and/or materials to CCI and Shipp. Said services and/or materials were accepted, used and enjoyed by CCI and Shipp.

28. CCI and Shipp received the benefit of plaintiffs' contractual performance.

29. CCI and Shipp were unjustly enriched at the prejudice and expense of plaintiffs when CCI and Shipp entered into the settlement agreement with AT&T because plaintiffs were not made a party to the agreement and received no payment pursuant to the agreement, even though plaintiffs were entitled to any and all proceeds of the settlement.

30. CCI and Shipp's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiffs' rights. Plaintiffs are therefore entitled to an award of exemplary and punitive damages.

31. As a result of the foregoing, plaintiffs have been damaged by not less than Fifty Million Dollars ($50,000.000.00).

WHEREFORE, plaintiffs demands judgment against defendants for damages in excess of fifty million dollars ($50,000,000.00), breach of contract damages, liquidated damages, unliquidated damages, actual damages, compensatory damages, consequential damages, continuing damages, direct damages, expectancy damages, foreseeable damages, future damages, general damages, prospective damages, special damages, punitive damages, attorneys fees, together with interest and costs of suit, and legal relief as this Court deems just and proper under the circumstances.

COUNT FOUR
The Proceeds of the Settlement Agreement Should be Held in a Constructive Trust Under State Law and Federal Law

32. Plaintiffs repeat and reallege the allegations of Paragraphs One (1) through Thirty-One (31) as if the same were set forth at length herein.

33. As a result of CCI and Shipp's breach of contract, breach of fiduciary duty, unjust enrichment, breach of the covenant of good faith and fair dealing and fraud, the retention of the proceeds of the settlement agreement by CCI and Shipp would result in the unjust enrichment of CCI and Shipp.

34. CCI and Shipp's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiffs' rights. Plaintiffs are therefore entitled to an award

of exemplary and punitive damages.

35. As a result of the foregoing, plaintiffs have been damaged by not less than Fifty Million Dollars ($50,000,000.00).

WHEREFORE, plaintiffs demands judgment against the defendants for the establishment of a constructive trust in which the proceeds of the settlement agreement should be placed, and for such legal relief as this Court deems just and proper under the circumstances.

COUNT FIVE
Breach of Covenant of Good Faith and Fair Dealing
under State Law and Federal Law

36. Plaintiffs repeat and reallege the allegations of Paragraphs One (1) through Thirty-Five (35) as if the same were set forth at length herein.

37. Plaintiffs entered into the contract with Shipp and CCI relating to telecommunication services with AT&T.

38. Plaintiffs completed all of their obligations pursuant to the contract.

39. After entering into the contract, Shipp and CCI committed wilful, malicious, oppressive and fraudulent actions against plaintiffs, said actions undertaken with wilful disregard for plaintiff's contractual rights. Specifically, Shipp and CCI entered into the settlement agreement with AT&T whereby plaintiffs were not made a party to the agreement and received no payment pursuant to the agreement, even though plaintiffs were entitled to any and all proceeds of the settlement.

40. By committing the above acts, defendants breached the implied covenant of good faith and fair dealing with plaintiffs pursuant to the contract.

41. Shipp and CCI's conduct was willful, malicious, oppressive and fraudulent, and

undertaken with wilful disregard for plaintiffs' rights. Plaintiffs are therefore entitled to an award of exemplary and punitive damages.

42. As a result of the foregoing, plaintiffs have been damaged by not less than Fifty Million Dollars ($50,000,000.00).

WHEREFORE, plaintiffs demands judgment against defendants for damages in excess of fifty million dollars ($50,000,000.00), breach of contract damages, liquidated damages, unliquidated damages, actual damages, compensatory damages, consequential damages, continuing damages, direct damages, expectancy damages, foreseeable damages, future damages, general damages, prospective damages, special damages, punitive damages, attorneys fees, together with interest and costs of suit, and legal relief as this Court deems just and proper under the circumstances.

COUNT SIX

Fraud, Misrepresentation and Deceit under State Law and Federal Law

43. Plaintiffs repeat and reallege the allegations of Paragraphs One (1) through Forty-Two (42) as if the same were set forth at length herein.

44. Shipp and CCI knowingly and with the intent to defraud plaintiffs, falsely represented to plaintiffs that it would share in all revenue collected from any customers and any judgment or court settlement pursuant to the terms of the contract.

45. Said representations made by Shipp and CCI were false when made and defendant knew said representations were false because Shipp and CCI did not intend to share any revenue, judgment or court settlement with plaintiffs.

46. Said representations were material in that plaintiffs would never had entered in the

contract and entered litigation as co-plaintiff if plaintiffs knew said representations were false.

47. Plaintiffs justifiable relied on the false representations of Shipp and CCI and entered in the contract and entered litigation as co-plaintiff.

48. Shipp and CCI failed to share in any customer revenue and failed to distribute any of the settlement money to plaintiffs.

49. As a direct and proximate result of the above actions committed by Shipp and CCI, plaintiffs lost revenue, money and profits.

50. Shipp and CCI's conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiffs' rights. Plaintiffs are therefore entitled to an award of exemplary and punitive damages.

51. As a result of the foregoing, plaintiffs have been damaged by not less than Fifty Million Dollars ($50,000,000.00).

WHEREFORE, plaintiffs demands judgment against defendants for damages in excess of fifty million dollars ($50,000,000.00), breach of contract damages, liquidated damages, unliquidated damages, actual damages, compensatory damages, consequential damages, continuing damages, direct damages, expectancy damages, foreseeable damages, future damages, general damages, prospective damages, special damages, punitive damages, attorneys fees, together with interest and costs of suit, and legal relief as this Court deems just and proper under the circumstances.

COUNT SEVEN
Breach of Quasi-Contract under State Law and Federal Law

52. Plaintiffs repeat and reallege the allegations of Paragraphs One (1) through Fifty-

One (51) as if the same were set forth at length herein.

53. Plaintiffs conferred a benefit on Shipp and CCI by transferring existing telecommunication customers to Shipp and CCI. This transfer was pursuant to defendant's request.

54. Plaintiffs had a reasonable expectation of being paid by Shipp and CCI for transferring said customers.

55. By litigating as co-plaintiffs in the lawsuit against AT&T, plaintiffs had a reasonable expectation of participating in any and all court settlements reached between defendants and AT&T.

56. Defendants will be unjustly enriched by retaining the proceeds of the court settlement with AT&T because plaintiffs were not made a party to the settlement.

57. Defendants' conduct was willful, malicious, oppressive and fraudulent, and undertaken with wilful disregard for plaintiffs' rights. Plaintiffs are therefore entitled to an award of exemplary and punitive damages.

58. As a result of the foregoing, plaintiffs have been damaged by not less than Fifty Million Dollars ($50,000,000.00).

WHEREFORE, plaintiffs demands judgment against defendants for damages in excess of fifty million dollars ($50,000,000.00), breach of contract damages, liquidated damages, unliquidated damages, actual damages, compensatory damages, consequential damages, continuing damages, direct damages, expectancy damages, foreseeable damages, future damages, general damages, prospective damages, special damages, punitive damages, attorneys fees, together with interest and costs of suit, and legal relief as this Court deems just and proper under

the circumstances.

COUNT EIGHT
Promissory Estoppel under State Law and Federal Law

59. Plaintiffs repeat and reallege the allegations of Paragraphs One (1) through Fifty-Eight (58) as if the same were set forth at length herein.

60. CCI and Shipp made clear and unambiguous promises to plaintiffs to pay for the transfer of existing customers and to share any and all court settlements with plaintiffs relating to the litigation with AT&T.

61. Plaintiffs reasonably and detrimentally relied on these promises and (1) transferred said customers and (2) participated with CCI and Shipp as co-plaintiff in the lawsuit against AT&T.

62. CCI and Shipp failed to perform said promises by failing to share any and all court settlements with plaintiffs. As a direct and proximate result of the above actions committed by CCI and Shipp, plaintiffs lost revenue, money and profits.

As a result of the foregoing, plaintiffs have been damaged by not less than Fifty Million Dollars ($50,000,000.00).

WHEREFORE, plaintiffs demands judgment against defendants for damages in excess of fifty million dollars ($50,000,000.00), breach of contract damages, liquidated damages, unliquidated damages, actual damages, compensatory damages, consequential damages, continuing damages, direct damages, expectancy damages, foreseeable damages, future damages, general damages, prospective damages, special damages, punitive damages, attorneys fees, together with interest and costs of suit, and legal relief as this Court deems just and proper under

continuing damages, direct damages, expectancy damages, foreseeable damages, future damages, general damages, prospective damages, special damages, punitive damages, attorneys fees, together with interest and costs of suit, and legal relief as this Court deems just and proper under the circumstances.

DAMAGES

WHEREFORE, plaintiffs demands judgment against defendants for:

1. damages in excess of fifty million dollars ($50,000,000.00);
2. breach of contract damages;
3. liquidated damages;
4. unliquidated damages;
5. actual damages;
6. compensatory damages;
7. consequential damages;
8. continuing damages;
9. direct damages;
10. expectancy damages;
11. foreseeable damages;
12. future damages;
13. general damages;
14. prospective damages;
15. special damages;
16. exemplary and punitive damages;

17. attorneys fees,

18. together with interest and costs of suit, and legal relief as this Court deems just and proper under the circumstances.

JURY DEMAND PURSUANT TO LOCAL CIVIL RULE 38.1

Plaintiffs hereby demand trial by jury as to all issues in this complaint.

CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2

The matter in controversey is the subject of another action (Docket No. 95-908(NHP), United States District Court, District of New Jersey).

Dated: August 1, 1998

LAWRENCE S. COVEN (9572)
314 U.S. Highway 22 West
Suite E
Green Brook, N.J. 08812
THE LAW OFFICES OF LAWRENCE S. COVEN
ATTORNEYS FOR PLAINTIFFS, WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. and 800 DISCOUNTS, INC.

Exhibit 5

CLOSED

FILED

MAY 30 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. and 800 DISCOUNTS INC.,	Civil Action No.; 98-3920
Plaintiffs,	
v.	**JUDGMENT**
COMBINED COMPANIES, INC., and LARRY SHIP,	
Defendants.	

This action having come on trial before the Court; and the issues having been duly tried and a decision having been duly rendered on the record on May 24, 2001;

IT IS on this 30th day of May 2001, hereby,

ORDERED that judgment be entered in favor of defendants on all counts of the Complaint.

Katharine S. Hayden, U.S.D.J.

ENTERED

5-31-01

Exhibit 6

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., a Florida corporation,	:	
AND	:	
WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC., 800 DISCOUNTS, INC. and New Jersey corporations,	:	CIVIL ACTION NO.
AND	:	
PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC., a Pennsylvania corporation	:	
Plaintiffs,	:	
v.	:	
AT&T CORP., a New York corporation,	:	
Defendant.	:	

JOINT BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND MANDATORY PRELIMINARY INJUNCTION

Helein & Waysdorf, P.C.
1850 M Street, N.W.
Suite 550
Washington, D.C. 20036
(202) 466-0700

Podvey, Sachs, Meanor, Catenacci,
Hildner & Cocoziello
Legal Center, One Riverfront Plaza
Newark, New Jersey 07102
(201) 623-1000

February 24, 1995

The Deposit and the PSE Transfer

AT&T's demand for a deposit also ignores the effect of CCI's request to transfer all the Plans to PSE's Contract Tariff 516. PSE is a long time customer of AT&T, has no history of late payments and has established and maintained its financial responsibility with AT&T for several years and is the current customer of record under AT&T's Contract Tariff No. 516.

PSE is fully responsible for all charges for any traffic serviced under its Contract Tariff 516, including the traffic transferred to CCI by Winback which would have been included in the traffic CCI seeks to transfer to PSE. Bello Aff. at ¶ 5. Had the transfer of the traffic of Plans to PSE's Contract Tariff No. 516 been effected, AT&T could look to PSE for payment of charges, backstopped by both CCI and/or Winback for any non-payment of pre-transfer charges or any shortfalls.

AT&T has no exposure to any "shortfalls" in revenues for still another reason, one which arises from its own tariff provisions. Because each of the Plans acquired by CCI were ordered from AT&T prior to June 17, 1994, pursuant to Section 3.3.1.Q.4 of AT&T Tariff F.C.C. No. 2, each of these Plans may be discontinued without liability.[8/] Discontinuance of the Plans

---

8/Section 3.3.1.Q.4 of AT&T's Tariff F.C.C. No. 2, 8th Revised Page 61.19 provides that a CSTP II customer may cancel without liability if it meets specified alternatives. Exh. D. The alternative which applies to the transfer transaction attempted by CCI to PSE, and unlawfully blocked by AT&T, is the alternative of subscribing to an AT&T Contract Tariff (at 1st Revised Page 61.19.2) having "a total 800 service revenue commitment exceeding the sum of the remaining annual revenue commitment for the CSTP II which the Customer is terminating." Id. CCI, as transferee of the Winback Plans qualified directly as a Customer seeking to "[subscribe] to an AT&T Contract Tariff," but which AT&T refused to negotiate. Thereafter, by transferring the Plans to PSE, PSE qualified as an existing Customer already "[subscribed] to an AT&T Contract Tariff." Id. In both cases, CCI or PSE met the condition of having "a total 800 service revenue commitment exceeding the sum of the remaining annual revenue commitment for the CSTP II which the Customer is terminating." Id.

Exhibit 7

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., **a Florida corporation,**	
AND	
WINBACK & CONSERVE PROGRAM, INC., **a New Jersey corporation,**	**AFFIDAVIT OF LARRY G. SHIPP IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AN ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS**
AND	
PUBLIC SERVICE ENTERPRISES OF PA, INC., **a Pennsylvania corporation**	
Plaintiffs,	
v.	
AT&T CORP., **a New York corporation,**	
Defendant.	

Larry G. Shipp, being duly sworn, deposes and says:

1. I am now, and have been since October 5, 1994, the President of Combined Companies, Inc. ("CCI"). I make this affidavit in further support of Plaintiffs' Application for an Order to Show Cause With Temporary Restraints.

Backgrounnd -- CCI's Resale Business

2. CCI, along with its wholly owned subsidiaries Global Long Distance Marketing ("GLDM") and National Telesis Incorporated ("NTI") (collectively "CCI"), is engaged in the telecommunications resale business (known as "aggregation"). CCI resells AT&T tariffed "800"

services, formerly known as Inbound WATS (for "Wide Area Telephone Service") to unaffiliated small business customers (known as "end users").

3. CCI is able to provide 800 service for the small entities by entering into contracts with AT&T that provide for substantial discounts for volume usage. CCI meets its usage commitments to AT&T by aggregating the 800 calling traffic of its end-users. Under these contracts CCI is able to provide its end-users larger discounts on their AT&T long distance usage than they would otherwise be entitled to if they were each billed individually as direct AT&T customers. The end-users of CCI are not able themselves to obtain these large discounts because their individual 800 usage is not large enough to qualify for the volume discounts AT&T has tariffed. AT&T's discounts are designed for its largest corporate users, like the Fortune 500 corporations.

4. As AT&T's "Customer of Record", CCI is responsible for all charges lawfully incurred in connection with the 800 services rendered by AT&T. CCI's end users, many of which formerly received their 800 services as direct customers of AT&T, become "customers" of CCI pursuant to AT&T's corporate policy and AT&T FCC filed tariffs.

5. AT&T continues to provide the actual network facilities, equipment and associated management thereof by which these 800 end users are served. AT&T directly bills, each month, in AT&T's name, the 800 end users for all monthly charges associated with their 800 usage. On these AT&T bills, AT&T includes the level of discounts associated with the volume commitment made by CCI.

The Winback Transfers To CCI

6. In November, 1994, CCI agreed to purchase the aggregation business of another reseller, Winback and Conserve Program, Inc. ("Winback"). CCI and Winback established the terms on which the sale would be made.

7. Winback and CCI proceeded to implement the routine procedures to effect the transfer as tariffed in AT&T Tariff F.C.C. No. 2, Section 2.1.8 (the "Transfer Tariff"). These procedures coordinate and ensure an orderly transition of rights and obligations between customers, and to establish the new customer of record for the services being provided.

8. Section 2.1.8 of the Transfer Tariff required Winback and CCI to both execute the AT&T "Transfer of Service" forms ("TSA forms"), as the former and new customer respectively. These required TSA forms were submitted by CCI, as the new customer to AT&T on December 16, 1994.

9. These TSA forms covered Winback's RVPP and CSTP II plans which CCI had acquired, namely, Plans Nos. 1351, 1583, 2430, 2828, 2829, 3124, 3468, 3524 and 3663, true copies of which are attached hereto as Exhibit A (hereinafter collectively the "Plans").

10. Despite CCI's submission of the TSA forms on December 16, AT&T requested that CCI resubmit the TSA forms. CCI complied with this request by submitting the TSA forms on December 22, 1994. CCI again submitted certain of the TSA forms on December 30, 1994 (see Exhibit B).

11. On December 30, 1994, CCI finally received written confirmation of the TSA's by AT&T for two plans - Plans No. 2829 and 3124. A copy of AT&T's written confirmation is attached hereto as Exhibit C.

12. In early January, 1995, after receiving oral confirmation that all TSA's were in the possession of AT&T, CCI received "welcoming calls" from AT&T's Account Team (the former Account Team of Winback), thereby acknowledging the Account Team's recognition of the acquisition of the ownership of all of the Plans by CCI pursuant to the TSA's CCI had submitted.

13. Through my prior dealings with AT&T, I have learned that AT&T's usual practice is to never provide written approval of TSA forms submitted to it, and that if no additional information is requested, the transfer of the selling aggregator's (Winback's) AT&T service and the responsibility and credit for the traffic of that aggregators' end user customers to the buying aggregator (CCI) is considered accepted and complete. In fact, in my six years in dealing with AT&T on this issue, I have never received written approval back from AT&T on any TSA - all of which were approved. This "practice" is further supported, and consistent with the applicable AT&T Transfer of Service form language, which provides that "this transfer or assignment will become effective on the later of (date submitted) or AT&T's agreement in writing of the transfer or assignment". Which should be pointed out, has always been the date submitted (unless notification from AT&T otherwise within 15 days of receipt).

14. By January 12, 1995, CCI had received no information from AT&T rejecting or otherwise conditioning its acceptance of the TSA's originally submitted by CCI on December 16, 1994.

15. As no further information was requested by AT&T within the 15 days following CCI's submission of the TSA forms on December 16, I assumed, in accordance with AT&T's past business practice, and consistent with their tariffs, that the transfer had been effected as of December 16, 1994, the date they were originally submitted.

16. During the week of January 8, 1995, CCI received further indication that the TSA's had been formerly processed when it received an invoice from AT&T mailed to CCI as the Customer, reflecting a credit owed CCI. This credit was a result of promotional monies owed the former "customer of record" (Winback), and now belonged to CCI as a result of the sale by Winback of the plans to CCI (see Exhibit D). CCI subsequently received these credits in the form of check's from AT&T to CCI, dated January 30, 1995.

AT&T's Demand for a Deposit

17. Concurrent with CCI's acquisition from Winback of the plans, CCI had been in discussions with AT&T to obtain a Contract Tariff of its own. AT&T, as a result of its confidential discussions with CCI, was clearly aware of the nature of CCI's business plan, and understood that CCI was in the market to acquire plans for the purpose of combining the traffic of small and medium size resellers into a "new" Contract Tariff with AT&T, to improve the discounts of the plans for the benefit of the "groups" end-users.

18. On January 12, 1995, after numerous promises to return phone calls and continued delays in responding to CCI's proposals, it became clear to CCI that AT&T had no real interest in working toward a Contract Tariff for CCI. CCI therefore notified AT&T that it had no other choice but to look to a wholesale provider to provide the services it had hoped to obtain from AT&T.

19. On January 13, 1995, CCI submitted service orders to Public Service Enterprises of PA, Inc. ("PSE") to provision its accounts within PSE's Contract Tariff #516, thereby providing deeper discounts to CCI's end-users.

20. On January 24, 1995, AT&T advised CCI that none of the TSA's, including Plan Nos. 2829 and 3124 for which CCI had already received verification of AT&T's written acceptance of the transfer of these Plans to CCI, would be "approved" by AT&T until CCI submitted a deposit to AT&T of $13,540,000.00. A copy of AT&T's deposit demand is attached hereto as Exhibit E. AT&T based its demand for the deposit on the assertion that it needed "to guarantee payment of the charges for the [Plans]" because CCI "was a start-up company without an established credit history and ha[d] made a sizable revenue commitment by ordering [the Plans]." Id.

21. AT&T did not make its demand for a deposit until five weeks after CCI had first submitted the first set of TSA's to transfer the Plans, and three weeks after the "no-action" period under AT&T's tariff which provides for automatic AT&T approval and acceptance of TSA's in such instances; rather its request came curiously only after CCI and AT&T broke off discussions dealing with CCI obtaining its own Contract Tariff, and ten (10) days after CCI submitted its service orders to PSE.

22. CCI does not understand why AT&T would even consider asking for a deposit, since CCI's subsidiaries, Global Long Distance Marketing, Inc. ("Global") and National Telesis, Inc. ("National"), are long time customers of AT&T (Global has been an AT&T Customer in good standing since 1989) with no record of late payments and absolutely no proven history of late payments to AT&T. Global and National are long time customers of AT&T each of whose financial responsibility is a matter of record with AT&T.

23. As the parent corporation of Global and National, CCI is controlled by the same ownership identical to the ownership of Global and National with whom AT&T has a

long-standing business relationship and successful history of business dealings in regard to AT&T's services.

24. Under CCI's aggregation program, end users of the 800 services aggregated are billed directly by AT&T and charges are collected by AT&T directly from such end users. In the event of any default in payment by an end user under its applicable Plan, AT&T may look first to CCI as its post-transfer customer of record for all going-forward unpaid end user charges and to CCI and Winback for defaults on charges incurred prior to transfer of the Plans. AT&T, pursuant to its tariff(s), may also look to either CCI and/or Winback for any "shortfalls" in meeting the minimum annual commitment levels required under the tariff.

The CCI/PSE Transfers

25. On January 13, 1995, PSE and CCI submitted written orders to AT&T to transfer the 800 traffic under all of the Plans to the credit of PSE, as customer of record under AT&T's Contract Tariff 516. A copy of those written orders is attached hereto as Exhibit F. The purpose of this traffic transfer order was to effect a deeper discount for CCI end-users through a further consolidation of traffic volume under the more favorable terms of the PSE Contract Tariff 516 than existed under the tariff terms then covering the Plans themselves.

26. AT&T refused to accept the transfer of the traffic under the Plans to PSE's Contract Tariff 516. AT&T asserted that CCI was not the customer of record for the Plans and hence had no authority to order the transfer of the traffic under the Plans to PSE's Contract Tariff 516. A copy of AT&T's transfer refusal is attached hereto as Exhibit G.

27. CCI's request to transfer the traffic it acquired from Winback to PSE's Contract Tariff 516 resulted from an earlier refusal of AT&T to act on a request for service from CCI. CCI had requested that AT&T provide CCI with its own contract tariff.

28. CCI's request for its own contract tariff was based on its offer to provide AT&T with $200,000,000.00 in traffic over a five (5) year period. This was to be accomplished through the marketing efforts of CCI's independent agents, the marketing staff of companies CCI acquired and direct sales. To make its request all the more attractive to AT&T, CCI had indicated that approximately $100,000,000.00 of this traffic would have represented new AT&T traffic "won back" from AT&T's major competitors. Moreover, CCI pointed out to AT&T that the charges under the contract tariff CCI sought would have been billed by AT&T at higher rates than AT&T is currently billing to other customers reselling AT&T's services.

29. AT&T refused to seriously respond to CCI's request to be provided service pursuant to a contract tariff of its own. CCI thereafter submitted its orders to PSE to have the traffic it had purchased under the Winback Plans included within PSE's Contract Tariff 516.

30. It is CCI's understanding that CCI's rights to transfer the traffic under the Plans it had acquired from Winback to PSE's Contract Tariff 516 is provided for by AT&T Tariff F.C.C. No. 2, Section 2.1 8.A.

CCI's Continuing Efforts

31. On January 30, 1995, in a further effort to obtain processing of its TSA's and transfer of traffic requests, and to further minimize CCI's loss of end-users and agents, CCI, pursuant to AT&T policy and procedures recently enacted (January 1, 1995), submitted to AT&T

letters of agency executed by the original "customers of record" for the Plans authorizing CCI to act on their behalf with AT&T. See Exhibit H.

32. Also on January 30, 1995, PSE submitted to AT&T orders executed by CCI as agent for the original customers of record directing AT&T to move the traffic currently served under the Plans for inclusion under Contract Tariff 516. See Exhibit I.

33. CCI expressly informed AT&T that by submitting these letters of agency and orders executed by CCI as agent that CCI did not acknowledge, expressly or implicitly, that it is not the 'customer of record' for the Plans or in any way withdraw or place in abeyance the TSA's associated with the Plans to PSE for inclusion in Contract Tariff 516.

34. Again on January 30, 1995, CCI requested AT&T to process the transfer orders immediately.

CCI is Suffering Immediate and Irreparable Harm

35. CCI will be irreparably harmed if the transfers requests for service are not honored by AT&T. CCI is the successor in interest to the aggregation business its two subsidiaries created. CCI was created to consolidate the aggregation programs of other aggregators like Winback with CCI's own aggregation programs conducted by its subsidiaries. The increased volume of traffic through consolidation provides the size required to maintain aggregation in today's artificially created hostile environment, which many end-users have come to rely on to reduce their long distance expenditures.

36. Acquisition of Winback's traffic is therefore essential to CCI's business plan and its long term success. Should that acquisition be delayed or denied, CCI's business plan will suffer a mortal blow. There is no other aggregation program available for acquisition like that of

Winback's 15,000 customer base program. Moreover, there is no means by which CCI could replicate the sheer number of customers by marketing itself to the open market. CCI is not unlike any business which seeks to grow and strengthen its position in the communications marketplace by acquisition.

37. Moreover, the monetary value of CCI's damages are not readily calculable, as they include significant harm to CCI's goodwill and reputation with respect to its independent contractor agents and the public, as well as the continued loss of its end-users. However, I estimate that CCI is losing at least $1,000,000.00 per month, a loss which CCI is not capable of absorbing without significant threat to the continued existence of its business.

Larry G. Shipp
President
Combined Companies, Inc.

Subscribed and sworn to before me
this 24 day of February, 1995

Notary Public

MARYLOUISE V. WILCOX
MY COMMISSION # CC246668 EXPIRES
December 10, 1998
BONDED THRU TROY FAIN INSURANCE, INC.

Exhibit I

PUBLIC SERVICE ENTERPRISES
OF PENNSYLVANIA, INC.
45 OWEN STREET, FORTY FORT, PA. 18704
PHONE 717/287-3161

January 13, 1994

Mrs. Ann Anderson
Minneapolis Fron End Center
10th Floor
Minneapolis, MN 55402-3233

Dear Ann:

Please find a properly executed AT&T Transfer of Service Agreements (TSA) to move all the end-user locations, except the 181 account number and 131 lead account number into PSE's CT 516 (CSTP/RVPP Plan ID # 003690).

The individual plans should each receive their own bill group as listed below:

Plan ID #	Report Group	Report Group Name
001351	038	CCI001
002828	039	CCI002
001583	040	CCI003
003124	041	CCI004
002430	042	CCI005
003663	043	CCI006
003468	044	CCI007
003524	045	CCI008
002829	046	CCI009

This order is solely to move the locations associated with these plans and not intended to in any way to discontinue the plans.

Sincerely,

Sara B. Pettigrew

Sara B. Pettigrew

\SBP

Enclosures

Transfer of Service
Agreement and Notification

I, Combined Companies Inc 71 1351, hereby
(Former Customer)

request that AT&T transfer or assign service for Account Number(s) MOVE ALL BTNS Except 181 000 0018 133 to Public Service Enterprises of Pennsylvania, Inc.
(Customer)

Former Customer understands and agrees that this transfer or assignment does not relieve or discharge it from remaining jointly and severally liable with New Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the account numbers specified above and (2) the unexpired portion of any applicable minimum payment period(s).

New Customer hereby assumes all obligations of Former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).

Services are not to be interrupted or relocated at the time transfer or assignment is made. This transfer or assignment will become effective on the later of 1/10/95
(Date)
or AT&T's agreement in writing of the transfer or assignment.

Nothing herein shall give any customer, assignee, or transferee any interest or proprietary right in any given AT&T service telephone number.

TRAFFIC ONLY
Keep PLAN IN TACT

MOVE ALL BTN'S
Except 181 000 0018 133

C+M G V 1/10/95
Former Customer (Date)
Authorized Representative

PRESIDENT
Title

4/3/
New Customer (Date)
Authorized Representative

Asst VP.
Title

Transfer of Service
Agreement and Notification

I, COMBINED COMPANIES Inc. Plan 2828, hereby
(Former Customer)

request that AT&T transfer or assign service for Account Number(s) ALL BTN's Except MAIN Acct's + 181 000 0035 588 / 131 112 8222 448

to Public Service Enterprises of Pennsylvania, Inc.
(Customer)

Former Customer understands and agrees that this transfer or assignment does not relieve or discharge it from remaining jointly and severally liable with New Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the account numbers specified above and (2) the unexpired portion of any applicable minimum payment period(s).

New Customer hereby assumes all obligations of Former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).

Services are not to be interrupted or relocated at the time transfer or assignment is made. This transfer or assignment will become effective on the later of 1/16/95
(Date)
or AT&T's agreement in writing of the transfer or assignment.

Nothing herein shall give any customer, assignee, or transferee any interest or proprietary right in any given AT&T service telephone number.

TRAFFIC ONLY
Move all BTN's

Except 181 000 0035 588

AND 131 112 8222 448

CSTPA/Keep Plan 2828 IN TACT
AS A pre 6/17/95 PLAN

[signature] 1/16/95
Former Customer (Date)
Authorized Representative

President
Title

[signature] 1/15/95
New Customer (Date)
Authorized Representative

[signature]
Title

Transfer of Service
Agreement and Notification

I, Combined Companies, Inc TO 1583, hereby
(Former Customer)

request that AT&T transfer or assign service for Account Number(s) All BTN's Except for 131 029 8680 574 181 000 0009 123

to Public Service Enterprises of Pennsylvania, Inc.
(Customer)

Former Customer understands and agrees that this transfer or assignment does not relieve or discharge it from remaining jointly and severally liable with New Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the account numbers specified above and (2) the unexpired portion of any applicable minimum payment period(s).

New Customer hereby assumes all obligations of Former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).

Services are not to be interrupted or relocated at the time transfer or assignment is made. This transfer or assignment will become effective on the later of 1/10/95
(Date)
or AT&T's agreement in writing of the transfer or assignment.

Nothing herein shall give any customer, assignee, or transferee any interest or proprietary right in any given AT&T service telephone number.

TRAFFIC ONLY
MOVE ALL BTN'S
Except
181 000 0009123
+ 131 029 8680 574

Keep 1583 IN TACT

C M L 1/10/95
Former Customer (Date)
Authorized Representative

President
Title

1/13/95
New Customer (Date)
Authorized Representative

Asst. V. Pres.
Title

Transfer of Service
Agreement and Notification

I, Combined Companies, Inc 3124, hereby
(Former Customer)

request that AT&T transfer or assign service for Account Number(s) MOVE ALL BTN's Except - 181 000 0030 144 / 131 001 0967 310

to Public Service Enterprises of Pennsylvania, Inc.
(Customer)

Former Customer understands and agrees that this transfer or assignment does not relieve or discharge it from remaining jointly and severally liable with New Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the account numbers specified above and (2) the unexpired portion of any applicable minimum payment period(s).

New Customer hereby assumes all obligations of Former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).

Services are not to be interrupted or relocated at the time transfer or assignment is made. This transfer or assignment will become effective on the later of 1/10/95
(Date)

or AT&T's agreement in writing of the transfer or assignment.

Nothing herein shall give any customer, assignee, or transferee any interest or proprietary right in any given AT&T service telephone number.

TRAFFIC ONLY
Keep 3124 INTACT

MOVE ALL ACCOUNTS
EXCEPT 181-000-0030-144
& 131-001-0967-310

C. [illegible] 1/10/95
Former Customer (Date)
Authorized Representative

PRESIDENT
Title

[signature] 1/13/95
New Customer (Date)
Authorized Representative

[signature]
Title

Transfer of Service
Agreement and Notification

I, COMBINED COMPANIES INC PLAN 36 2430, hereby
(Former Customer)

request that AT&T transfer or assign service for Account Number(s) MOVE ALL BTNS Except 181 000 0052 757 131 096 6048 779

to Public Service Enterprises of Pennsylvania, Inc.
(Customer)

Former Customer understands and agrees that this transfer or assignment does not relieve or discharge it from remaining jointly and severally liable with New Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the account numbers specified above and (2) the unexpired portion of any applicable minimum payment period(s).

New Customer hereby assumes all obligations of Former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).

Services are not to be interrupted or relocated at the time transfer or assignment is made. This transfer or assignment will become effective on the later of 1/10/95
(Date)
or AT&T's agreement in writing of the transfer or assignment.

Nothing herein shall give any customer, assignee, or transferee any interest or proprietary right in any given AT&T service telephone number.

TRAFFIC ONLY
MOVE ALL BTN'S
Except
181 000 0052 757
131 096 6048 779

keep CSTP II IN TACT
AS P.e 6/17/94 PLAN

C. L. 1/10/95
Former Customer (Date)
Authorized Representative

PRESIDENT
Title

1/13/95
New Customer (Date)
Authorized Representative

Title

Transfer of Service
Agreement and Notification

I, COMBINED COMPANIES PLAN ID 3663, hereby
(Former Customer)

request that AT&T transfer or assign service for Account Number(s) ~~Except~~ MOVE ALL BTNS Except 181 000 0142 457 131 134 0230 284

to Public Service Enterprises of Pennsylvania, Inc.
(Customer)

Former Customer understands and agrees that this transfer or assignment does not relieve or discharge it from remaining jointly and severally liable with New Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the account numbers specified above and (2) the unexpired portion of any applicable minimum payment period(s).

New Customer hereby assumes all obligations of Former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).

Services are not to be interrupted or relocated at the time transfer or assignment is made. This transfer or assignment will become effective on the later of JANUARY 10, 1995
(Date)
or AT&T's agreement in writing of the transfer or assignment.

Nothing herein shall give any customer, assignee, or transferee any interest or proprietary right in any given AT&T service telephone number.

TRAFFIC ONLY
MOVE ALL BTNs
EXCEPT
181-000-0142-457
131-134-0230-284

COMBINED 1/10/95
Former Customer (Date)
Authorized Representative

PRESIDENT
Title

1/13/95
New Customer (Date)
Authorized Representative

A. VICE
Title

CSTD/KEEP PLAN
3663 IN TACT.

Transfer of Service
Agreement and Notification

I, Combined Companies Inc. JD 3468, hereby
(Former Customer)

request that AT&T transfer or assign service for Account Number(s) MOVE ALL BTN'S Except 181 000 0091 740 131 123 6023 035

to Public Service Enterprises of Pennsylvania, Inc.
(Customer)

Former Customer understands and agrees that this transfer or assignment does not relieve or discharge it from remaining jointly and severally liable with New Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the account numbers specified above and (2) the unexpired portion of any applicable minimum payment period(s).

New Customer hereby assumes all obligations of Former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).

Services are not to be interrupted or relocated at the time transfer or assignment is made. This transfer or assignment will become effective on the later of 1/10/95
(Date)

or AT&T's agreement in writing of the transfer or assignment.

Nothing herein shall give any customer, assignee, or transferee any interest or proprietary right in any given AT&T service telephone number.

TRAFFIC ONLY
TRANSFER ALL
BTN'S
Except the 2 Following
181-000 0091740
+ 131 123 6023 035

Place All BTN'S IN
RJPD Report GROUP
044

Former Customer Authorized Representative — 1/10/95 (Date)

PRESIDENT
Title

New Customer Authorized Representative — 1/13/95 (Date)

V.P.
Title

Transfer of Service
Agreement and Notification

I, COMBINED COMPANIES, INC PAN 3524, hereby
(Former Customer)

request that AT&T transfer or assign service for Account Number(s) ALL BTN'S Except 181 000 0105 264 + 131 126 6569385

to Public Service Enterprises of Pennsylvania, Inc.
(Customer)

Former Customer understands and agrees that this transfer or assignment does not relieve or discharge it from remaining jointly and severally liable with New Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the account numbers specified above and (2) the unexpired portion of any applicable minimum payment period(s).

New Customer hereby assumes all obligations of Former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).

Services are not to be interrupted or relocated at the time transfer or assignment is made. This transfer or assignment will become effective on the later of _____ 1/10/95
(Date)

or AT&T's agreement in writing of the transfer or assignment.

Nothing herein shall give any customer, assignee, or transferee any interest or proprietary right in any given AT&T service telephone number.

TRAFFIC ONLY
MOVE ALL BTN'S
Except 181 000 0105 264
+ 131 126 6569 385

Keep CSTP II PLAN IS 3524
IN TACT AS A P.C
6/17/94 PLAN

C T G L 1/10/95
Former Customer (Date)
Authorized Representative

PRESIDENT
Title

1/13/95
New Customer (Date)
Authorized Representative

Asst V. Pres
Title

Transfer of Service
Agreement and Notification

I, COMBINED COMPANIES, INC PLAN ID 2829, hereby
(Former Customer)

request that AT&T transfer or assign service for Account Number(s) MOVE ALL BTN'S EXCEPT 1 800 0099259 & 131 112 8087823

to Public Service Enterprises of Pennsylvania, Inc.
(Customer)

Former Customer understands and agrees that this transfer or assignment does not relieve or discharge it from remaining jointly and severally liable with New Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the account numbers specified above and (2) the unexpired portion of any applicable minimum payment period(s).

New Customer hereby assumes all obligations of Former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).

Services are not to be interrupted or relocated at the time transfer or assignment is made. This transfer or assignment will become effective on the later of 1/16/95
(Date)
or AT&T's agreement in writing of the transfer or assignment.

Nothing herein shall give any customer, assignee, or transferee any interest or proprietary right in any given AT&T service telephone number.

TRAFFIC ONLY
MOVE ALL BTN'S
Except
1 800 0099259
& 131 112 8087823

Keep CSTP II PLAN ID
2829 IN TACT
AS Per 6/17/94 PLAN

[signature] 1/16/95
Former Customer (Date)
Authorized Representative

PRESIDENT
Title

[signature] 1/13/95
New Customer (Date)
Authorized Representative

Title

Exhibit 8

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., and WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. and 800 DISCOUNTS, INC., Plaintiffs, v. AT&T CORP., Defendant.	:	Civil Action No. 95-908 (SDW/SCM)

BRIEF OF AT&T CORP. IN OPPOSITION TO PLAINTIFFS' MOTION TO LIFT STAY AND TO SCHEDULE DAMAGES

James F. Bendernagel, Jr.
(*Pro Hac Vice* to be submitted)
Joseph R. Guerra
(Admitted *Pro Hac Vice*)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20015
(202) 736-8000

Richard H. Brown
DAY PITNEY LLP
1 Jefferson Road
Parsippany, NJ 07054
(973) 966-6300

Attorneys for Defendant AT&T Corp.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTRODUCTION

Defendant AT&T Corp. ("AT&T") submits this brief opposing Plaintiffs' motion to lift the stay. Plaintiffs moved for the same relief a year ago, complaining of agency delay and arguing that any decision on the referred issue by the Federal Communications Commission ("FCC") would be moot. Denying that motion based on the law of the case doctrine, this Court "strongly suggested" that Plaintiffs petition for mandamus to compel a ruling from the FCC. 3/18/15 Hrg. Tr. at 28-31 (Certification of Richard H. Brown ("Brown Cert."), Ex. 1). Plaintiffs never did so. Instead, they moved to *suspend* the FCC proceedings—*after* the agency announced that a draft decision is "on circulation" to the full Commission.[1] Having ignored its advice, Plaintiffs now burden this Court with yet another motion to lift the stay. Once again, they identify no previously unavailable evidence or change in the law that justifies deviating from the law of the case.

To the contrary, Plaintiffs repeat the same mootness argument that this Court rejected last year, then invent a new one based on a nine year-old FCC scheduling order. In that 2007 Order, the FCC (1) acknowledged that Judge Bassler had directed Plaintiffs to obtain an interpretation of all obligations in § 2.1.8 of

[1] *See* FCC, Items on Circulation, *available at* https://transition.fcc.gov/fcc-bin/circ_items.cgi (last visited Mar. 21, 2016).

AT&T's tariff, (2) stated that its "goal" was "to assist the referring court," and (3) rebuffed Plaintiffs' attempt to expand the proceeding *beyond the § 2.1.8 issue*.[2] Yet Plaintiffs now claim that the FCC actually rebuffed Judge Bassler and "eliminated all AT&T's 2.1.8 defenses as outside the scope of the case." Pls. Br. at 5. This claim cannot be reconciled with the plain terms of the *2007 FCC Order*, Plaintiffs' conduct since 2007, or the fact that a draft decision in the referral proceeding is on circulation. Unsupported hearsay conversations with FCC staff, *see* Certification of Alfonse Inga [Dkt. No. 188-12] ("Inga Cert.") at ¶¶ 2-3, cannot establish otherwise.

Plaintiffs also claim that a 20-year old decision by Judge Politan resolved the relevant issues in this case and that "the Third Circuit in 1996 referred a non controversy" to the FCC. Pls. Br. at 10 (capitalization and emphasis changed). That claim is also baseless. In his 1996 decision, Judge Politan himself left his referral in place, and a preliminary injunction is not a dispositive ruling in any event.

At bottom, the thrust of virtually all of Plaintiffs' arguments is that no tribunal should decide the meaning of "all obligations" in § 2.1.8—not the FCC or this Court—because, in their view, this issue is a "red herring" that is not part of

[2] Order Extending Pleading Cycle in the 2006 Declaratory Ruling Proceeding at ¶¶ 2-3 (rel. Jan. 12, 2007) (the "*2007 FCC Order*") (Brown Cert., Ex. 2).

the case. Judge Bassler rejected this contention nearly 10 years ago, and none of Plaintiffs' arguments, or their scurrilous attacks on AT&T and its counsel, provides a basis for overturning Judge Bassler's prior ruling. Indeed, because a decision is on circulation at the agency, reopening the case now would not be "a wise course of action," 3/18/15 Hrg. Tr. at 30 (Brown Cert., Ex. 1), as it runs a very real risk of inconsistent judgments.

After setting forth the relevant background facts, AT&T explains why various procedural defects independently justify rejection of Plaintiffs' motion; why none of Plaintiffs' claims justifies lifting the stay; and why Plaintiffs' requests for relief on the underlying merits are groundless.

BACKGROUND

A. The District Court's Initial Primary Jurisdiction Referral

As AT&T has previously explained, *see* AT&T Corp.'s Br. In Opp. to Pls.' Mot. to Lift Stay and For Partial Summ. J. at 10 [Dkt. No. 171] ("AT&T 2015 Opp.") (Brown Cert., Ex. 3), this case arose in 1995, when Plaintiffs proposed a two-step transfer of their WATS services.[3] Plaintiffs proposed that (1) they would

[3] In the 1990s, AT&T provided inbound Wide Area Telecommunication Service ("WATS"), commonly known as 800 service, under AT&T FCC Tariff No. 2. Under this tariff, AT&T provided discounts to customers who committed to certain traffic volumes for a specified period of time. If the revenue commitments were not met, the customer had to pay "shortfall" charges to make up the difference.

transfer their plans (with the associated traffic) to Combined Companies Inc. ("CCI"), and (2) CCI would transfer all of the revenue producing phone numbers and virtually all of the traffic associated with those plans, but not the plans or the obligations to pay shortfall and termination liabilities under the plans, to Public Service Enterprises of Pennsylvania ("PSE"). *See* Opinion and Order, Docket No. 96-20 (Oct. 17, 2003) (the "*2003 FCC Order*") at ¶ 10 (Brown Cert., Ex. 4).

AT&T declined to process the proposed transfer. With respect to the second step, AT&T believed there was a substantial risk that the "traffic only" transfer would result in CCI not having sufficient revenue to meet any shortfall and termination liabilities it incurred. *See id.* ¶ 4 n.26. AT&T further explained that, pursuant to § 2.1.8 of the tariff, it "refused to permit the transfer precisely because PSE, the 'new' customer in the transfer, did not assume '*all* of the obligations' of the 'old' customer, CCI" and that "Plaintiffs' effort to make the clear tariff language '*all* the obligations,' mean something less than 'all' [was] pure sophistry." *See* AT&T's 3/30/95 Post-Hrg. Br. at 7-8 (quoting AT&T FCC Tariff No. 2, § 2.1.8) (Brown Cert., Ex. 5).

Plaintiffs sued to compel AT&T to execute the transfer requests. On May 19, 1995, Judge Politan found that the request to transfer the traffic from CCI to PSE (the second step) presented tariff construction issues within the primary jurisdiction of the FCC. 5/19/95 Op. [Dkt. 32] at 15, Order [Dkt. 33] at 2 (Brown

Cert., Ex. 6). He referred "the issue of The transfer of the aforesaid plans and/or their traffic as between [CCI] and [PSE] and its compliance or not with the terms of the governing tariff." Order [Dkt. 33] at 2.

B. The Third Circuit's Decision

Plaintiffs sought reconsideration of Judge Politan's May 19, 1995 decision, arguing that AT&T had not diligently pursued the referred questions at the FCC. (Brown Cert., ¶3).[4] Judge Politan did not reconsider the correctness of his earlier primary jurisdiction referral, but he issued a preliminary injunction requiring AT&T to transfer the traffic from CCI to PSE pending the FCC's ruling on the referred matters, on the ground that AT&T had not pursued the issue at the FCC. 3/5/96 Op. at 21 [Dkt. No. 54] (Brown Cert., Ex. 7).

On appeal, the Third Circuit reversed. It recognized that "AT&T objected to the proposal because the plaintiffs did not intend to transfer their potential liability for shortfall and termination charges, which form part of their contracts with AT&T." *Combined Co. v. AT&T Corp.*, No. 96-5185, at 2 (3d Cir. May 31, 1996) (Brown Cert., Ex. 8). Having properly referred the tariff interpretation issue to the FCC, the Third Circuit held, it was improper to prejudge the outcome of the

[4] Plaintiffs had relied on the FCC to adjudicate the tariff interpretation issues in the context of an AT&T filing to revise portions of Tariff No. 2. Plaintiffs moved to reconsider the May 1995 decision after AT&T withdrew its proposed revision.

referral. *Id.* at 7. The court held that it was incumbent on Plaintiffs to institute appropriate proceedings at the FCC. *Id.* at 7-8.

C. The October2003 FCC Decision

In July 1996, Plaintiffs filed a petition with the FCC, arguing among other things that § 2.1.8 did not allow AT&T to refuse to process the proposed CCI/PSE transfer. *See* 7/15/96 Joint Pet. at 17-26 (Brown Cert., Ex. 9). AT&T explained that it objected to the CCI/PSE transfer "[p]recisely because the proposed CCI-to-PSE transaction was artificially structured to enable Petitioners to evade shortfall or termination liabilities," and that, as a result, the "proposed transfer was (i) not authorized under the transfer provisions of AT&T's tariff (Section 2.1.8); and (ii) a violation of the antifraud provisions of the tariff (Section 2.2.4)." Comments of AT&T Corp. in Opp. to Joint Pet. at 13-14 ("1996 AT&T Cmts.") (Brown Cert., Ex. 10).[5]

[5] This Court later entered a stay pending a ruling by the FCC. 3/12/97 Order (Brown Cert., Ex. 11). Also in 1997, Plaintiffs filed a Supplemental Complaint asserting that AT&T had discriminated against them by not giving them a more favorable contract tariff and by allegedly allowing others to make the same type of transfers that AT&T had refused to process for them (the "discrimination" claim), and that AT&T had improperly imposed shortfall charges on CCI's end-users in 1996 (the "shortfall infliction" claim). 3/4/97 Suppl. Compl. (Brown Cert., Ex. 12).

In 2003, the FCC held that § 2.1.8 did not apply to the "traffic-only" transfer from CCI to PSE and thus did not prohibit that transfer.[6] The FCC concluded that AT&T had conceded that the term "WATS" meant only the underlying CSTP-II plans themselves, not the traffic, and that § 2.1.8 therefore governed only a transfer of plans, not a transfer of traffic. *Id.* The FCC also ruled that AT&T could not prohibit the transaction under the tariff's "fraudulent use" provision. *Id.* at ¶¶ 10-13.

D. The January 2005 D.C. Circuit Decision

On appeal, the D.C. Circuit held that § 2.1.8 did apply to traffic transfers, and that AT&T had not conceded otherwise. *AT&T Corp. v. FCC*, 394 F.3d 933, 937- 39 (D.C. Cir. 2005). The court explained that it would "eviscerate[]" the acknowledged purpose of § 2.1.8, to allow PSE to acquire "nearly all services--all the benefits--associated with [the] CSTP II plans" and to leave behind "CCI's obligations--the burdens under the plans." *Id*. at 938. Noting Plaintiffs' assertion that the only obligations that have to be assumed are the outstanding indebtedness and the unexpired portions of any applicable minimum service period, the D.C. Circuit declined to decide whether the enumeration of these two obligations

[6] *See 2003 FCC Order* at ¶ 13 (Brown Cert., Ex. 4).

affected the "requirement that new customers assume '*all* obligations of the former Customer.'" *Id.* at 939 n.2.

E. This Court Denies Plaintiffs' Efforts in 2005-2007 to Lift The Stay

After the D.C. Circuit's decision, Plaintiffs filed a series of certifications in this Court from Mr. Inga and later a motion to lift the stay, which argued, among other things, that the FCC had resolved the "all obligations" issue in Plaintiffs' favor and the issue was in all events a "red herring" and "bogus."[7] After briefing and oral argument, Judge Bassler refused to lift the stay and ruled that the FCC had not determined whether PSE had to assume shortfall and termination commitments under § 2.1.8 because "it had already determined that § 2.1.8 did not apply" to the proposed transfer.[8] Judge Bassler also denied Plaintiffs' request for re-argument, explaining again "that the FCC did not determine what obligations should transfer under § 2.1.8 in its October 2003 Opinion, because the FCC found that § 2.1.8 did not even apply to the [CCI/PSE] transaction."[9] After Judge Bassler retired, Plaintiffs sought reconsideration, which this Court denied. *See* 6/19/07 Order [Dkt. 165] (Brown Cert., Ex. 17).

---

[7] *See* 5/31/05 Br. in Supp. Mot. to Lift Stay [Dkt. 125-6] at 9, 11-12 (Brown Cert., Ex. 13); Pls. 6/27/05 Ltr. Br. [Dkt. 128] at 10-12 (Brown Cert., Ex. 14).

[8] *See* 6/1/06 Op. [Dkt. 146] at 14 n.5 (Brown Cert., Ex. 15).

[9] *See* 8/7/06 Ltr. Order [Dkt. 161] at 3 (Brown Cert. Ex. 16).

F. The Second FCC Proceeding

Plaintiffs filed a declaratory ruling petition with the FCC in September 2006, in which they asked the FCC to resolve not only the "all obligations" issue, but also the discrimination and "shortfall infliction" claims asserted in their Supplemental Complaint. After AT&T objected that the latter two issues had not been referred, Plaintiffs sought an extension of time so they could determine "whether the District Court wants just the traffic only transfer issue resolved or all other issues." *See* 12/29/06 Req. for Ext., ¶ 11 (Brown Cert., Ex. 18).

The FCC promptly rebuffed this effort to expand the proceedings beyond the scope of § 2.1.8. It issued an order stating that Judge Bassler's order did:

> [N]ot expand the scope of the issue previously presented. Rather, *we have been asked to interpret the scope of § 2.1.8 of AT&T's Tariff No. 2*, a matter already extensively briefed by the parties. Accordingly, we will not extend the reply comment period in this proceeding to await further direction from the district court. We grant a brief extension to the parties to file reply comments, which should be informed by this reminder as to the scope of the matter presented here.

See 2007 FCC Order, ¶ 3 (emphasis added) (footnotes omitted) (Brown Cert., Ex. 2).

Plaintiffs understood that this order did *not* moot Judge Bassler's referral on the scope of § 2.1.8. Three weeks later, they filed lengthy arguments about § 2.1.8,

and did so in numerous subsequent filings.[10] They also understood what the *2007 FCC Order* did mean—the FCC would not consider issues *other than* the meaning of § 2.1.8. Plaintiffs therefore repeatedly sought reconsideration of the order. Pls. 2/8/07, 2/15/07, and 2/26/07 Reqs. for Recons. (Brown Cert., Exs. 21, 22, & 23).

G. Plaintiffs' December 2014 Motion to Lift Stay

In December 2014, Plaintiffs asked the FCC to temporarily suspend its proceeding, claiming that an FCC ruling on § 2.1.8 would have prospective effect only and that the referral was thus moot. 12/10/14 Req. for Temporary Suspension (Brown Cert., Ex. 24). Plaintiffs claimed that FCC staff had "confirmed" Plaintiffs' realization that the case was moot. *Id.* at 1. But in emails, the FCC staff person explained that she had merely provided background information on how agency rules worked, and that she was "not answering a question specific to the facts of your case or providing legal advice, nor am I providing a statement on behalf of the Commission." 12/10/14 email chain at 4 (Brown Cert., Ex. 25).

Nevertheless, Plaintiffs filed a motion with this Court to lift the stay. They claimed that "the question of which obligations are assumed on traffic transfers without the plan ha[d] already been answered" by the FCC "and there [wa]s no

[10] *See* Pls. 1/31/07 Reply Comments (Brown Cert., Ex. 19); *see, e.g.*, Pls. 5/17/07 Summ. Decision, WC Docket No. 06-210 (posted May 18, 2007), *available at* http://apps.fcc.gov/ecfs/comment/view.action?id=5514563956 (last retrieved Mar. 21, 2016) ; Pls. 9/7/07 Summ. Decision (Brown Cert., Ex. 20).

reason to wait indefinitely for the FCC to revisit this issue." Pls. 12/15/14 Br. to Lift Stay [Dkt. 166] at 23 (Brown Cert., Ex. 26). They also claimed that, if the FCC ruled for AT&T in the referral proceeding, that ruling "would have prospective application only." *Id.* at 24 n.9; *see also* 3/18/15 Hrg. Tr. at 7, 11 (Brown Cert, Ex. 1).

In its opposition, AT&T explained that Judge Bassler had properly concluded that the referred question had not yet been resolved by the FCC, and that nothing had changed to call into question his prior ruling. This Court agreed, and denied Plaintiffs' motion. 3/18/15 Hrg. Tr. at 31 (Brown Cert., Ex. 1). The Court specifically noted that it was "not convinced" by Plaintiffs' mootness argument, *id.* at 29, and it "strongly suggest[ed]" that Plaintiffs file a mandamus petition to compel the FCC to rule on the referred tariff issue. *Id.* at 30-31.

H. Developments Since The March 2015 Decision

Plaintiffs never sought mandamus. Instead, they claim that they advised the FCC of the Court's suggestion, and FCC staff told them to review the *2007 FCC Order*. Pls. Br. at 5. Based on that review, Plaintiffs assert that they discovered (yet again) that Judge Bassler's referral is moot. *Id.* at 5-8. They further claim that FCC staff "confirmed" this view, *id.* at 6, however they provide no substantiation for this claim. Instead, Mr. Inga describes *his* interpretation of the *2007 FCC Order*, Inga Cert., ¶ 2, but does not state under oath that anyone at the FCC confirmed that

interpretation. Moreover, the FCC staff person who allegedly confirmed Plaintiffs' reading of the *2007 FCC Order, see id.*, is the same person who previously declined to answer questions specific to Plaintiffs' case or provide them with legal advice. 12/10/14 email chain (Brown Cert., Ex. 25).[11]

While purporting to rely on hearsay confirmation from FCC staff, Plaintiffs do not mention that, on November 2, 2015, the FCC posted on its website notice that a decision with regard to this matter was on circulation among the Commissioners. Moreover, just a week after telling this Court that the referral from Judge Bassler was moot, Plaintiffs filed new requests with the FCC asking it to decide, *in addition to the 2006 referral from Judge Bassler*, four other issues, all of which pertain to § 2.1.8 and/or the movement of traffic without the plan. *See* Pls. 3/4/16 Filing (Brown Cert., Ex. 31).

---

[11] Mr. Inga's email exchanges with FCC staff after this Court's ruling in March 2015 indicate that FCC staff took the same position again. On April 8, 2015, Mr. Inga set forth his interpretation and asked staff "[i]s this what the Jan 12th 2007 FCC order is stating? I know the answer is yes but I need to hear it from the FCC." *See* 4/8/15 email (Brown Cert., Ex. 27). Three days later, he told AT&T counsel that FCC staff would conduct a conference call "and explicitly detail for AT&T how the FCC's Jan 12th 2007 Order is to be understood." *See* 4/11/15email chain at 1 (Brown Cert., Ex. 28). Six days later, he stated that Plaintiffs had "asked the FCC staff to look at" their interpretation and were expecting "an exact clarification" from FCC staff on Monday, April 20. *See* 4/17/15 email (Brown Cert., Ex. 29). On April 20, the FCC staff person wrote that she "cannot participate in a call such as that described" in Mr. Inga's email of April 11. *See* 4/20/15 email chain (Brown Cert., Ex. 30).

ARGUMENT

Plaintiffs' latest motion to lift the stay should be denied for a variety of reasons. First, its blatant procedural defects independently mandate denial. Second, none of Plaintiffs' arguments justifies the relief they seek. Their only "new" argument is a baseless claim that, in 2007, the FCC ruled that Judge Bassler's referral was moot—a ruling Plaintiffs somehow overlooked for nine years, and that is flatly belied by the language of the Order itself and the agency's notice several months ago that an order resolving the matter is "on circulation." The remainder of their motion (1) recycles a hodgepodge of arguments previously raised; (2) makes baseless accusations against AT&T's counsel; and (3) makes an unsupported request that the Court award unspecified summary relief and proceed to damages.

I. PLAINTIFFS' MOTION SHOULD BE DENIED BASED ON ITS BLATANT PROCEDURAL DEFECTS.

Plaintiffs' motion can be denied based on clear procedural defects in their supporting papers. Under Local Civil Rule 7.2 (a), affidavits, declarations, and certifications "shall be restricted to statements of fact within the personal knowledge of the signatory" and "[a]rgument of the facts and law shall not be contained in such documents." Violation of these restrictions subject the signatory to censure, sanctions, or both, and Courts will disregard any such statements. *Id*.

Mr. Inga's Certification [Dkt. 188-12] violates these rules. It is replete with legal and factual arguments. *See, e.g.*, Inga Cert., ¶ 13 (the D.C. Circuit "misread the traffic language"); *id*. at ¶ 17 ("Judge Roberts again misstates the tariff"). Moreover, Plaintiffs submit a hodgepodge of exhibits that are not authenticated. The Court should ignore these improper submissions.

Relatedly, Plaintiffs seek relief from the law of the case, yet they never mention the standard for such relief, much less purport to satisfy it. They likewise seek what amounts to partial summary judgment on the issue of liability, yet their papers include no statement of undisputed materials facts, no recitation of the relevant legal standard, and no explanation for why that satisfy that standard. Finally, their brief is not signed by counsel and thus does not comport with Fed. R. Civ. P. 11.

When Plaintiffs' prior counsel, Mr. Arleo, moved to withdraw, AT&T noted that Plaintiffs are corporations that must be represented by an attorney. The various procedural defects and omissions noted above suggest that Plaintiffs seek to skirt that rule. In all events, these defects warrant denial of the motion.

II. JUDGE BASSLER'S REFERAL IS NOT MOOT.

Last year, this Court rejected Plaintiffs' claim that Judge Bassler's referral was moot because an FCC interpretation of § 2.1.8 would have prospective effect only. 3/18/15 Hrg. Tr. at 29 (Brown Cert., Ex. 1). Undeterred, they repeat that

mootness claim again,[12] as well as new mootness claims that likewise have no merit.

A. Plaintiffs' Contention That The FCC Deemed The Referral Moot Nine Years Ago Is Baseless

Plaintiffs claim that the FCC determined—over nine years ago, in an order addressing a request for an extension of time—that Judge Bassler's referral was moot. This claim is based on two premises: (1) that the FCC determined, in 2003, that the original referral concerned *only* AT&T's fraudulent use defense under § 2.2.4, and (2) that in 2007, the FCC declined to expand the scope of the referral to include any § 2.1.8 issues. Pls. Br. at 5. Both premises rest on patently implausible readings of the FCC's orders.

1. The FCC Did Not Rule In 2003 That AT&T's Sole Defense Was Fraudulent Use Under § 2.2.4 Of Its Tariff.

To establish the first premise of their claim, Plaintiffs quote paragraph 13 of the *2003 FCC Order*. *See* Pls. Br. at 5. There, the FCC concluded that AT&T did not act in accordance with the "fraudulent use" provisions of its tariff, and then stated that "AT&T does not rely upon any other provisions of its tariff to justify its conduct." *2003 FCC Order*, ¶ 13 (Brown Cert., Ex. 4). Plaintiffs read the latter sentence "to explicitly state that the scope of the Third Circuit Referral was

[12] *See* Pls. Br. at 13 n.6, 26.

fraudulent use under 2.2.4." Pls. Br. at 7. They further claim that, when the FCC declined to expand the scope of the referral proceeding in 2007, it "eliminated all AT&T's 2.1.8 defenses as outside the scope of the case." *Id.* at 5*; see also id.* (FCC has not issued a decision "because the 2006 referral [by Judge Bassler] on obligation issues 'did not expand the scope' of the original referral by the Third Circuit on AT&T's *sole* defense of fraudulent use under a different tariff section 2.2.4" (emphasis added)); *id.* at 7 ("it would be totally inconsistent for the FCC in its 2003 Order to explicitly state that the scope of the Third Circuit Referral was fraudulent use under 2.2.4 and then release an Order in 2007 and say the scope of the case was about which obligations transfer under section 2.1.8").

This purported reading of the *2003 FCC Order* is frivolous. The original referral was indisputably *not* limited to AT&T's fraudulent use defense or § 2.2.4. Judge Politan's referral phrased the issue as "whether *section 2.1.8* permits an aggregator to transfer traffic under a plan without transferring the plan itself." 5/19/95 Op. at 15 [Dkt. 32] (emphasis added) (Brown Cert., Ex. 6). Moreover, AT&T argued to the FCC that the proposed CCI/PSE transfer "was (i) not authorized under the transfer provisions of AT&T's tariff (Section 2.1.8); *and* (ii) a violation of the antifraud provisions of the tariff (Section 2.2.4)." 1996 AT&T Cmts. at 14 (emphasis added) (Brown Cert., Ex. 10). In fact, it was only after rejecting *both* the § 2.2.4 *and* the § 2.1.8 defenses, *id.* at ¶¶ 8-9, 11-12, that the

Commission stated that AT&T did not "rely upon any other provisions of its tariff." *Id.* at ¶ 13.

The latter statement, therefore, cannot possibly be understood to mean that the original referral was limited to a fraudulent use defense. The fact that AT&T appealed the FCC's interpretation of *§ 2.1.8* to the D.C. Circuit—and prevailed—forecloses any such claim.

2. The FCC Did Not Rule In 2007 That Judge Bassler's Referral Was Beyond The Scope Of The Original Referral Or Moot.

Plaintiffs' reading of the *2007 FCC Order* is equally untenable. In December 2006, Plaintiffs agreed that the meaning of § 2.1.8 was properly before the FCC; indeed, they had briefed the issue extensively. When AT&T objected to their efforts to raise *additional* issues, Plaintiffs sought an extension of time for their reply comments so they could ask this Court "whether [it] wants just the traffic only transfer issue resolved or all other issues." 12/29/06 Req. for Ext. at ¶ 11 (Brown Cert. Ex. 18).

The FCC rejected that request, stating that it would "not extend the reply comment period in this proceeding to await further direction from the district court." *2007 FCC Order*, ¶ 3 (Brown Cert., Ex. 2). After recounting the history of its 2003 ruling and the D.C. Circuit decision, the FCC stated that Judge Bassler had "directed the Inga Companies to 'initiate an administrative proceeding to resolve

the issue of *precisely which obligations should have been transferred under § 2.1.8* of AT&T's Tariff No. 2 as well as any other issues left open by the D.C. Circuit's Opinion.'" *Id.* at ¶ 2 (emphasis added). Noting that its "goal" was "to assist the referring court," the FCC stated that the district court did "not expand the scope of the issue previously presented. Rather, *we have been asked to interpret the scope of section 2.1.8 of AT&T's Tariff No. 2*, a matter already extensively briefed by the parties." *Id.* at ¶ 3 (emphasis added) (footnotes omitted).

Thus, the FCC *rebuffed* Plaintiffs' efforts to expand the scope of the referral,[13] and made clear that it would decide the § 2.1.8 issue that Judge Bassler had instructed Plaintiffs to have resolved. The Order says nothing about § 2.2.4 or fraudulent use, and nowhere states that the referral is limited to that defense. By stating that it had "been asked to interpret" § 2.1.8, and that its "goal" was "to assist the referring court," *id.* ¶ 3, the FCC was plainly not *refusing* to provide the interpretation Judge Bassler had directed Plaintiffs to obtain. Further, if the FCC had deemed the referral moot, it surely would have said so directly and terminated

[13] Indeed, that is how Plaintiffs understood the Order. *See* 3/30/07 letter of Frank P. Arleo to the Court at 7-10 (noting that the January 2007 order "stat[ed] that the shortfall and discrimination issues were not specifically referred to the FCC" and asking the Court to enter a supplemental referral) (Brown Cert., Ex. 32).

the proceeding immediately. Instead, it provided time for the submission of reply briefs, and allowed the parties to litigate the matter for years afterwards.

Undaunted, Plaintiffs claim that, "if Judge Bassler's referral on which obligations transfer was actually within the scope of the case any Judge would certainly know that the FCC would not list for counsels at fn 13 where they could find the answers to the pending referral!" Pls. Br. at 6 (emphasis omitted). But the first two briefs cited in footnote 13 are Plaintiffs' 2006 petition initiating the referral on § 2.1.8 as Judge Bassler had ordered, and AT&T's Comments in response, which disputed Plaintiffs' interpretation of that provision; other documents listed were filed in the original referral. Footnote 13 of the *2007 FCC Order* thus simply illustrates that the scope of § 2.1.8 had already been "extensively briefed"; it nowhere indicates that the issue was somehow outside the scope of the referral or moot.

Plaintiffs also try to alter the clear meaning of the Order based on alleged statements by FCC staff. As noted earlier, however, Plaintiffs provide no evidence that any such statements were actually made. In all events, the FCC "speaks officially only through its decisions." *Joseph K. Lautieri*, 14 FCC Rcd 8796, 8796 (1999); *see also MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, (D.C. Cir. 1999) (FCC "speaks through its orders, not through counsel's filings). Indeed, FCC

staff had made that very point to Mr. Inga in 2014. 12/10/14 email chain (Brown Cert. Ex. 25).

Plaintiffs themselves plainly understood that the *2007 FCC Order* did *not* moot the § 2.1.8 issues. They filed extensive arguments about § 2.1.8 just three weeks later, and continued to do so in numerous subsequent filings for years afterwards.[14] And if the FCC had deemed the referral moot over nine years ago, it presumably would not be circulating a draft order among the Commissioners.

B. Plaintiffs' "Statute Of Limitations" Theory Of Mootness Is Groundless.

Searching for mootness everywhere, Plaintiffs also purport to find it in AT&T's alleged failure to adhere to the 15-day "statute of limitations" in § 2.1.8. Pls. Br. at 24. In fact, AT&T declined in writing to acknowledge the CCI/PSE transfer within 15 days.[15] Moreover, this entire claim misreads § 2.1.8.

That provision allowed transfers if (1) the customer of record "requests in writing" that AT&T make a transfer or assignment to the new customer, (2) the

---

[14] *See supra* at 10 n.10.

[15] *See* 1/23/95 letter from M. Bloch, Esq. to C. Boothby, Esq. (Brown Cert., Ex. 33). Plaintiffs claim that this letter is an untimely objection to the transfer from Plaintiffs to CCI. Pls. Br. at 24. But the letter states that "CCI must first establish service with AT&T" and that, "[a]fter that point, the CCI-to-PSE transfer . . . could be effectuated." 1/23/95 letter from M. Bloch, Esq. to C. Boothby, Esq. (Brown Cert., Ex. 33).

new customer "*notifies* [AT&T] in writing that it agrees to assume *all obligations* of the former Customer at the time of transfer or assignment," and (3) "within 15 days of receipt of *notification*," AT&T "acknowledges the transfer or assignment in writing." AT&T Tariff No. 2 § 2.1.8.A-C (emphases added) (Brown Cert., Ex. 34). Thus, the 15-day notice period did not begin until a "new" customer notified AT&T in writing that it was agreeing to assume *all obligations* of the "former" customer. Because PSE did not notify AT&T in writing that it was assuming CCI's obligations for shortfall and early termination liabilities, AT&T had no obligation to acknowledge the transfer within 15 days.

Moreover, the 15-day window simply placed a commercially reasonable time limit on AT&T's ability to delay implementation of a *valid* transfer. If AT&T failed to provide the written notice in 15 days, this third condition (AT&T's written acknowledgement) would cease to exist. Thus, after 15 days, AT&T could not rely on its own failure to acknowledge the transfer in writing as a ground for denying the transfer. The expiration of the 15-day period, however, had no effect on the other two conditions. If either of those conditions was not satisfied, AT&T was not obligated to process the transfer.[16]

[16] For subsection C to be a "statute of limitations," it would have had to state that, "notwithstanding the foregoing requirements, AT&T shall process all transfers of

Finally, Plaintiffs' mistaken "statute of limitations" theory is not new—it has been briefed before the FCC since 2006. Nor is it based on previously unavailable evidence. To the contrary, it is based on the tariff provision at the heart of the case since its beginning. This argument thus provides no basis for lifting the stay.

III. PLAINTIFFS' OTHER ARGUMENTS PROVIDE NO BASIS FOR LIFTING THE STAY

Beyond their groundless "mootness" theories, Plaintiffs raise a welter of other arguments. Plaintiffs have asserted many of these claims before in earlier motions to lift the stay, and several are mere variations of prior arguments. None provides a basis to lift the stay.

A. Plaintiffs' Section 2.1.8 "Hoax" Claim

In connection with their mistaken theory that "AT&T's sole defense in 1995 was fraudulent use," Pls. Br. at 3 (emphasis omitted), Plaintiffs also claim that the question of what obligations must be assumed on a traffic transfer is "all a hoax on Judge[] Bassler and this Court." *Id.* This is simply a hyperbolic version of an argument raised nearly a decade ago before Judge Bassler, where Plaintiffs claimed that "[w]hich obligations were transferred on partial traffic transfers was never an issue prior to the DC Circuit," and that "AT&T introduced its first bogus

---

WATS unless it objects in writing within 15 days of receipt of notification of a transfer." The second sentence of subsection C, however, said no such thing.

'no obligations' were transferred defense to the DC Circuit."[17] Plaintiffs' latest version of this groundless claim provides no basis for lifting the stay.

Plaintiffs claim that AT&T initially agreed that § 2.1.8 applied only to the transfer of a plan, but not transfers of traffic without the plan. But AT&T objected to the proposed CCI/PSE transfer—which was structured to avoid transferring the entire plan—on the ground that this transfer violated § 2.1.8. In March 1995, AT&T expressly stated that it "refused to permit the [CCI/PSE] transfer precisely because PSE, the 'new' customer in the transfer did not assume 'all of the obligations' of the 'old' customer, CCI. *See* AT&T Tariff No. 2, § 2.1.8." 3/30/95 Post-Hrg. Br. at 7-8 (Brown Cert., Ex. 5). Similarly, in 1996, AT&T told the FCC that § 2.1.8 requires a new customer to confirm "in writing that it 'agrees to assume *all* obligations of the former Customer at the time of transfer or assignment,'" and that, because PSE's transmittal letter had "declin[ed] to assume all obligations of the former Customer …, the proposed transfer, on its face, violated the terms of Section 2.1.8." 1996 AT&T Cmts. at 10-11 (Brown Cert., Ex. 10). And the D.C. Circuit recognized that AT&T "balked at" the CCI/PSE transfer, because it "maintained that Section 2.1.8 applied to the transaction, and that PSE

[17] Pls. May 11, 2006 Letter Br. [Dkt. 141] at 2 (Brown Cert., Ex. 35)

thus had to assume CCI's obligations in order for the transfer to go through." *AT&T Corp.*, 394 F.3d at 935.

To support their contention that AT&T "conceded that plan obligations do not transfer on a traffic only transfer," Pls. Br. at 11, Plaintiffs cite the language of Judge Politan's 1995 opinion—*i.e.*, "'whether section 2.1.8 [of AT&T's Tariff FCC No. 2] permits an aggregator to transfer traffic under a [tariffed] plan without transferring the **plan** itself.'" *Id.* at 11 n.2 (quoting *2007 FCC Order* at ¶ 2 (Brown Cert., Ex. 2)) (emphasis Plaintiffs'). This argument invites the same error that the FCC made in its 2003 decision. As the D.C. Circuit explained, "AT&T did not concede the inapplicability of Section 2.1.8 to transfers of traffic only. Indeed, had AT&T been willing to make such a concession, it presumably would not have contested the meaning of this provision." *AT&T Corp.*, 394 F.3d at 937.

Nor is there an irreconcilable conflict between AT&T's fraudulent use and § 2.1.8 defenses. Pls. Br. at 9. First, § 2.1.8 does not provide that "all obligations" transfer *automatically*. Rather, the new customer must agree in writing to accept them. Thus, as AT&T explained last year, statements in which AT&T noted that CCI, not PSE, would be obligated for tariffed obligations simply described the effect of the proposed transaction—one in which PSE did *not agree* to assume CCI's obligations.

Second, even when a new customer assumes all obligations in writing, the former customer remains liable under § 2.1.8's joint and several liability clause for obligations existing at the time of the transfer. *See* AT&T Tariff No. 2 § 2.1.8.A (Brown Cert., Ex. 34); *see also* 5/19/95 Op. [Dkt. 32] at 6 (Brown Cert., Ex. 6). Thus, there was no inconsistency between insisting that PSE assume CCI's obligations under § 2.1.8 and requiring CCI to post a deposit pursuant to Section 2.2.4 based on concerns that it could not pay the obligations for which it would remain liable even if PSE agreed to assume CCI's obligations for shortfall and termination liabilities. Finally, AT&T was entitled to rely on the fraudulent use provision in the event that the FCC concluded (as it initially did) that § 2.1.8 did not apply at all to traffic transfers. Such an alternative legal argument is not a concession that the principal legal argument is wrong.

B. The D.C. Circuit's "Misreading" Of § 2.1.8

Plaintiffs claim the stay should be lifted based on "**[n]ew evidence**" that both Judge Bassler and the DC Circuit were "confused" and "intentionally misled" about § 2.1.8. Pls. Br. at 26-28. According to Plaintiffs, because the tariff requires a "new customer" to assume "all obligations" of the "former customer," if CCI had transferred only traffic to PSE, CCI would not have been a "former" customer of AT&T; instead, CCI would have remained a customer under its plans, and PSE therefore would have been under no obligation to assume CCI's obligations for

shortfall and termination liability. Plaintiffs claim that this argument, which they somehow overlooked for the first 13 years of this litigation, is dispositive. That is plainly incorrect.

Contrary to Plaintiffs' assertion, § 2.1.8 does not define the "former customer" based only "on the service (traffic or plan) that it transfers." *Id.* at 27. It defines "former Customer" as "[t]he Customer of record." AT&T Tariff No. 2 § 2.1.8.A (Brown Cert., Ex. 34). Thus, by requiring the "new Customer" to agree in writing to "assume all obligations of the former Customer at the time of the transfer," § 2.1.8 required PSE to accept "all obligations" of CCI, which was the "Customer of record" in the transaction. Plaintiffs' contrary reading would allow PSE to acquire the benefits of CCI's traffic without assuming all of its obligations, undermining § 2.1.8's purpose of "ensur[ing] that benefits could not be transferred without concomitant obligations." *AT&T Corp.*, 394 F.3d at 939.[18]

[18] Plaintiffs try to bolster this argument by asserting that AT&T asked about settlement after the argument was first raised. Pls. Br. at 27. This one-sided account of settlement discussions is inadmissible. *See* Fed. R. of Evid. 408.

Finally, Plaintiffs' erroneous tariff interpretation theory is also not based on previously unavailable evidence, but rather documents that have been at issue since the beginning of this lawsuit. It thus provides no basis for lifting the stay.[19]

C. The District Court's March 1996 Decision

Much of Plaintiffs' brief is devoted to a discussion of Judge Politan's March 1996 decision. *See* Pls. Br. at 10-20. That decision, however, did not adjudicate AT&T's § 2.1.8 defense. Judge Politan's observation that "the Court finds nothing in Tariff F.C.C. No. 2 which prevents fractionalization" is not legally binding. He made no conclusive determinations, nor could he have done so in granting a preliminary injunction. *Wyrough & Loser, Inc. v. Pelmor Labs., Inc.*, 376 F.2d 543, 548 (3d Cir. 1967) ("[T]he district court's findings in preliminary injunction cases

[19] Plaintiffs also rehash another tariff interpretation claim, asserting that an AT&T proposal to amend § 2.1.8 prospectively to include a security deposit requirement proves that § 2.1.8 allowed transfers of traffic without the shortfall and termination obligations. Pls. Br. at 13-15 (citing AT&T Transmittals 8179 and 9229 and testimony by Richard Meade). Plaintiffs cited these materials in their motion for re-argument to Judge Bassler, (Pls. Jun. 9, 2006 Motion for Reconsideration [Dkt. 149] at 7-10 (Brown Cert., Ex. 36)), who found that they were "not dispositive" and instead made him "more convinced that the FCC" should interpret the tariff. Aug. 7, 2006 Ltr. Order [Dkt. 161] at 3 (Brown Cert. Ex. 16). The parties have briefed this issue before the FCC, where AT&T explained that, in the testimony Plaintiffs cite, Mr. Meade simply recognized that the deposit requirement was "new"—a recognition that was obviously not a concession that "all obligations" in § 2.1.8 did not encompass shortfall and termination obligations. 12/20/06 AT&T Comments in Opp. to Req. for Declaratory Rulings at 26-28 ("2006 AT&T Cmts.") (Brown Cert., Ex. 37).

are tentative and inconclusive, and, at best, are nothing more than a tentative judgment of the litigation") (internal citation omitted). Moreover, Judge Politan did not revise his earlier primary jurisdiction referral order, and he made clear that the injunction would stay in effect only until the FCC ruled on the referred issue. Finally, the Third Circuit vacated his decision on the ground that § 2.1.8 should be interpreted by the FCC.[20] In short, nothing in a decision issued 20 years ago—before proceedings at the FCC were ever commenced—justifies lifting the stay.

Likewise, there is no merit to what appears to be a claim by Plaintiffs that Judge Politan conclusively determined that the plans were immune from either shortfall or termination liability, and that this somehow moots the FCC referral. Pls. Br. at 11. While Judge Politan observed that there were a number of ways that shortfall and termination liability could be "defray[ed] or eras[ed],"[21] he never found that such liability had, in fact, been avoided for the plans at issue. Nor could he have made such a definitive ruling. First, findings made in connection with a preliminary injunction are not final. *Wyrough & Loser, Inc.*, 376 F.2d at 548.

---

[20] Nor did the Third Circuit refer a non-controversy. Judge Politan never "determined that there was no controversy left" when he issued his injunction. Pls. Br. at 10. If he had, he would have reversed his 1995 referral order. And the Third Circuit would not have required that referral if it had believed there was no controversy.

[21] 5/19/95 Op. [Dkt. 32] at 11 (Brown Cert., Ex. 6).

Second, it was impossible to determine, in March 1996, whether Plaintiffs could have avoided such liability, as such a finding depended on future compliance with the tariff's requirements for "restructuring" the plans, assuming the plans at issue were eligible for restructuring.

There is likewise no merit to Plaintiffs' assertion that because their plans were "Pre June 17th 1994 plans," they could be "continually . . . restructured" for up to three years without incurring any shortfall charges. *See* Pls. Br. at 20-22. As AT&T has explained in the referral proceeding, 2006 AT&T Cmts. at 31-34 (Brown Cert., Ex. 37), even if a plan were successfully "restructured," the potential for shortfall and termination liability would still exist with respect to the restructured commitments. Consequently, there would still be a need for the new customer to assume responsibility for any such liability—something that PSE was unwilling to do.[22] Indeed, PSE's unwillingness to assume that liability demonstrates far better than Plaintiffs' verbal contortions that shortfall was a risk on the plans at issue.

[22] Neither the FCC nor the D.C. Circuit reached a contrary conclusion. Indeed, the FCC specifically noted in its 2003 Order that it was not deciding that issue. *2003 FCC Order* at n.94 (Brown Cert., Ex. 4). And questions by an appellate judge during oral argument are not rulings by the court.

D. The Significance of the FCC's 1995 Order

Plaintiffs' reliance on the "grandfathering" language in the FCC's October 23, 1995 order[23] is also misplaced. As part of the *1995 FCC Order's* "grandfathering" requirement, AT&T agreed that, for a 12-month period, it would provide five-days notice before it made "any *change* to an existing term plan," and 14-days notice for any "*changes* to discontinuance with or without liability … or transfer or assignment of service." *1995 FCC Order* ¶ 134 (emphases added) (Brown Cert., Ex. 38). In refusing to process the proposed CCI-to-PSE transfer, AT&T was not *changing* the plans; it was simply enforcing them in accordance with the plain language of their pre-October 1995 terms. Accordingly, the 1995 FCC Order is not a basis to lift the stay and address this issue.

E. AT&T's Alleged Misrepresentations

As AT&T has previously shown, Plaintiffs have long made frivolous accusations against AT&T and its counsel in filings before the FCC, which has never seen fit to limit the number or incivility of submissions by Plaintiffs and their president, Mr. Inga. *See* AT&T's 2015 Opp. at 16-17 (Brown Cert., Ex. 3).

---

[23] Order, Docket No. 95-427 (rel. Oct. 23, 1995) ("*1995 FCC Order*") (Brown Cert., Ex. 38). Plaintiffs cited this document and raised arguments based on it in a May 11, 2006 letter to Judge Bassler [Dkt. 141] at 7 n.3 (Brown Cert., Ex. 35).

With the withdrawal of their prior counsel, Plaintiffs are now extending their irresponsible advocacy to this Court. These accusations are groundless.

Contrary to Plaintiffs' claims, Pls. Br. at 5, AT&T did not "intentionally misrepresent[]" the meaning of the *2007 FCC Order* to this Court. Pls. Br. at 5 (emphasis omitted). Not only did AT&T provide a block quote and a copy of the full Order itself, AT&T's straightforward reading of the Order is manifestly correct.

Nor has AT&T "intentionally deceived" this Court or the FCC by "intentionally misquot[ing] Section 2.1.8." Pls. Br. at 28 (emphasis omitted). In the passages Plaintiffs quote—which are taken from AT&T's comments to the FCC—AT&T paraphrased § 2.1.8, using the words "transferee" and "transferor" for the phrases "former customer" and "new customer." Plaintiffs absurdly describe this as an "intentional Cover-Up." *Id.* at 29 (emphasis omitted). But the FCC itself used this terminology in its brief to the D.C. Circuit, *see* Brief for Respondent, *AT&T Corp. v. FCC* , No. 03-1431 (filed May 17, 2004) at 19-20 n.10, as did the D.C. Circuit in its opinion. *AT&T Corp.*, 394 F.3d at 934, 935, 938.[24]

[24] Plaintiffs suggest that AT&T used "transferor" to avoid the fatal implications of the phrase "former Customer." Pls. Br. at 27. Plaintiffs did not advance their "former customer" theory until after AT&T submitted the comments that Plaintiffs now quote. *Compare* 2006 AT&T Cmts. (Brown Cert., Ex. 37) *with* Pls. 9/7/07

Similarly, AT&T counsel did not mislead this Court, Pls. Br. at 10, by demonstrating that, well before 2006, AT&T objected to the proposed CCI/PSE "traffic only" transfer on the grounds that PSE had failed to agree in writing to assume all of CCI's obligations, including the obligations to pay shortfall and termination charges. In a 1995 brief to this Court, AT&T explained that it had "refused to permit the transfer precisely because PSE, the 'new' customer in the transfer, did not assume '*all* of the obligations' of the 'old' customer, CCI" and that "Plaintiffs' effort to make the clear tariff language '*all* the obligations,' mean something less than 'all' [was] pure sophistry." *See* 3/30/95 Post-Hrg.Br. at 7-8 (quoting § 2.1.8) (Brown Cert., Ex. 5). AT&T similarly argued to the FCC in 1996 that § 2.1.8 "allows a transfer of CCI's service to PSE only if PSE agreed to assume all obligations under those plans," and that, by amending the transfer of service forms "to read 'Traffic Only,'" the "proposed transfer, on its face, violated the terms of Section 2.1.8." 1996 AT&T Cmts. at 13-14 (Brown Cert., Ex. 10). Citing the foregoing statements from AT&T's 1996 brief, the D.C. Circuit found it "quite clear, then, that AT&T did not concede the inapplicability of Section 2.1.8 to transfers of traffic only." *AT&T Corp.*, 394 F.3d at 937.

Summ. Decision (Brown Cert., Ex. 20). And, as AT&T has shown, Plaintiffs' "former customer" theory is groundless. *Supra* at 23-26.

Equally misplaced is Plaintiffs' accusation that AT&T counsel falsely asserted at oral argument that "zero obligations were being transferred and assumed" in the proposed CCI/PSE transaction. Pls. Br. at 9-10. In fact, counsel noted that, at the time of the transfer, the tariff required "the new customer [to] agree in writing to assume *all obligations* of the former customer"; Plaintiffs claimed "that they never said they wouldn't do that"; but they had written "traffic only" on the transfer forms. 3/18/15 Hrg. Tr. at 14 (emphasis added) (Brown Cert., Ex. 1). Counsel's point was that PSE had not agreed to accept "all" of the obligations, not that it was assuming "zero" obligations. And this Court understood AT&T's position:

> THE COURT: So your position, then, Mr. Guerra, is had there been some understanding that *all the obligations* would transfer as well, then everything would have obviously proceeded and the contracts would have been fine and AT&T would have been on board. It was the notation of "traffic only" which was sort of the impediment?
>
> MR. GUERRA: Yes. And, again, this is the understanding that the DC Circuit had, the FCC had.

Id. at 18 (emphasis added). Moreover, both the D.C. Circuit and FCC *did* understand that, under the proposed transaction, PSE would not assume *all* of CCI's obligations.[25]

[25] *See AT&T Corp.*, 394 F.3d 935 ("[t]he parties attempted to structure the transaction to avoid Section 2.1.8 of Tariff No. 2, so that *PSE would not have to*

Nor did counsel mislead this Court by "evad[ing] the **conclusive Tr9229 security deposit tariff evidence** that answers Judge Bassler's question: plan obligations don't transfer." Pls. Br. at 8. In the exchange that Plaintiffs cite, this Court did not mention AT&T's Transmittal 9229 or tariff evidence bearing on the meaning of "all obligations." *See* 3/18/15 Hrg. Tr. at 18 (Brown Cert., Ex. 1). Plaintiffs nevertheless base their contrary assumption on the fact that the Court was asking "about transferring obligations in reference to the CCI-PSE transfer." Pls. Br. at 8. But Transmittal 9229 would have had prospective effect only, and so would not have governed the CCI/PSE transfer at all.

In all events, it is clear that counsel understood the Court to be asking whether AT&T had insisted on a security deposit with respect to (a) the first leg of the two-step transaction (the transfer of plans from Plaintiffs to CCI) or (b) the second leg (the CCI/PSE transfer). Counsel's response made plain that that was his understanding of the question. *See* 3/18/15 Hrg. Tr. at 19 (Brown Cert., Ex. 1) (discussing first and second legs of the transaction). And his response was entirely accurate: AT&T *did* insist on a security deposit for the first leg of the transaction,

---

assume CCI's obligations on the transferred service") (emphasis added); *2003 FCC Order* at ¶ 11 (noting that, if AT&T had processed the proposed CCI/PSE transaction, "CCI …, *but not PSE*, would continue to have been responsible for any shortfall obligations") (emphasis added) (Brown Cert., Ex. 4).

and Judge Politan *did* compel AT&T to process that transfer without such a deposit.

Finally, AT&T did not "intentionally misle[a]d" the Court as to the nature of the evidence presented to the FCC regarding traffic only transfers. Pls. Br. at 9. AT&T asserted that it had "responded to" Plaintiffs' "contentions" before the FCC concerning "other transfers of service." AT&T 2015 Opp. at 29 (Brown Cert., Ex. 3). This statement is true. AT&T responded by explaining that this discrimination claim had not been referred and involved questions of fact that could not be resolved in a declaratory ruling proceeding. 2006 AT&T Cmts. at 35-38 (Brown Cert., Ex. 37). AT&T did not tell this Court that it had *refuted* Plaintiffs' factual assertions, as Plaintiffs appear to believe, because a declaratory ruling proceeding is not the forum for resolving factual disputes.

* * *

In sum, Plaintiffs have provided no basis for lifting the stay. Instead, in the face of evidence that the FCC may soon resolve the long-pending referral, Plaintiffs have burdened this Court (and AT&T) with a procedurally defective motion that advances repetitive and/or baseless arguments and is riddled with frivolous and improper accusations. Their motion should be denied.

IV. PLAINTIFFS' ALTERNATIVE GROUNDS FOR RELIEF

At various points, Plaintiffs note that they have claims that are not dependent on resolution of the § 2.1.8 issue. They suggest that, because certain of these claims are fact based and they have presented evidence, the claims can be summarily resolved in their favor. *See* Pls. Br. at 23-24, 25-26, and 29-31. The Court should reject Plaintiffs' suggestion to lift the stay to address these fact-based claims before resolution of the issues referred to the FCC.

Resolution of the referred issues could significantly affect the ultimate scope and resolution of this case. The fact that a draft decision is currently on circulation at the FCC reinforces that the sensible course is to wait for the FCC to rule.

AT&T also disagrees with Plaintiffs' position that these allegedly independent claims can be resolved without further proceedings, as there are legal issues (at least) that will need to be addressed and resolved in connection with these claims. For example, in their discussion of what Plaintiffs characterize as AT&T's "Illegal Billing Remedy," they quote a particular sentence from Tariff No. 2 and assert that the "[si]mple fact based issue . . . needs no FCC tariff interpretation." Pls. Br. at 23. However, Plaintiffs fail to quote the actual tariff provision upon which AT&T relied, and there is likely to be a dispute as to whether AT&T's conduct in June 1996 violated any tariff provision and whether AT&T's settlement with CCI precludes Plaintiffs from even pursuing this claim.

Another significant issue is whether AT&T's billing of shortfall charges to the accounts of CCI's customers had any impact given that the charges were removed in the next billing cycle.

Finally, the fact that some of these claims may be fact based—a proposition with which AT&T agrees[26]—and Plaintiffs have submitted evidence that it alleges supports their position does not mean that the claims can be summarily resolved in their favor. On their discrimination claim, Plaintiffs note that they have submitted affidavits and/or declarations from various individuals that supposedly advance their position regarding "traffic only" transfers. Pls. Br. at 9, 25. Plaintiffs further argue that AT&T has "zero" evidence and seem to suggest that that should be dispositive. But that is not how the litigation process works. At this point, those affidavits and declarations are hearsay, subject to evaluation by AT&T in discovery. Further, AT&T will, at the appropriate time, submit its own evidence

[26] AT&T agrees that these issues should ultimately be decided by this Court. Indeed, AT&T has consistently taken that position in opposing Plaintiffs' relentless efforts to present these issues for resolution by the FCC. In fact, since filing their motion to lift the stay, Plaintiffs have again sought to expand the scope of the referral proceeding—an action impossible to reconcile with their mootness claims.

and legal argument.[27] It is certainly not appropriate to short circuit the process and accept Plaintiffs' position that the case should "move to damages."

CONCLUSION

There is no basis for grant Plaintiffs' motion to lift the stay. The only thing that has changed since March 2015 is that Plaintiffs have disregarded the Court's suggestion about mandamus, and a decision is now on circulation at the FCC on the referred question. None of Plaintiffs other arguments support lifting the stay. Accordingly, AT&T respectfully requests that the Court deny Plaintiffs' motion in its entirety.

DAY PITNEY LLP
Attorneys for Defendant
AT&T Corp.

By: /s/ Richard H. Brown
RICHARD H. BROWN

Dated: March 21, 2016

[27] Plaintiffs claim that Judge Bassler "confirmed the legitimacy of" their discrimination claim. Pls. Br. at 25. In fact, the quote Plaintiffs provide is not from Judge Bassler, but from AT&T's counsel, who explained that, in footnote 87 of the *2003 FCC Decision*, the FCC acknowledged that Plaintiffs had asserted discrimination claims and explained that it was not addressing those claims. *See* 5/25/06 Tr. at 20-21 (Brown Cert., Ex. 39).

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of AT&T's Opposition to Plaintiffs' Motion to Lift Stay and Schedule Hearing to Ascertain Damages and all supporting papers were filed electronically via the court's Electronic Case Filing ("ECF") and were served on counsel of record electronically via ECF.

/s/ Richard H. Brown

DATED: March 21, 2016